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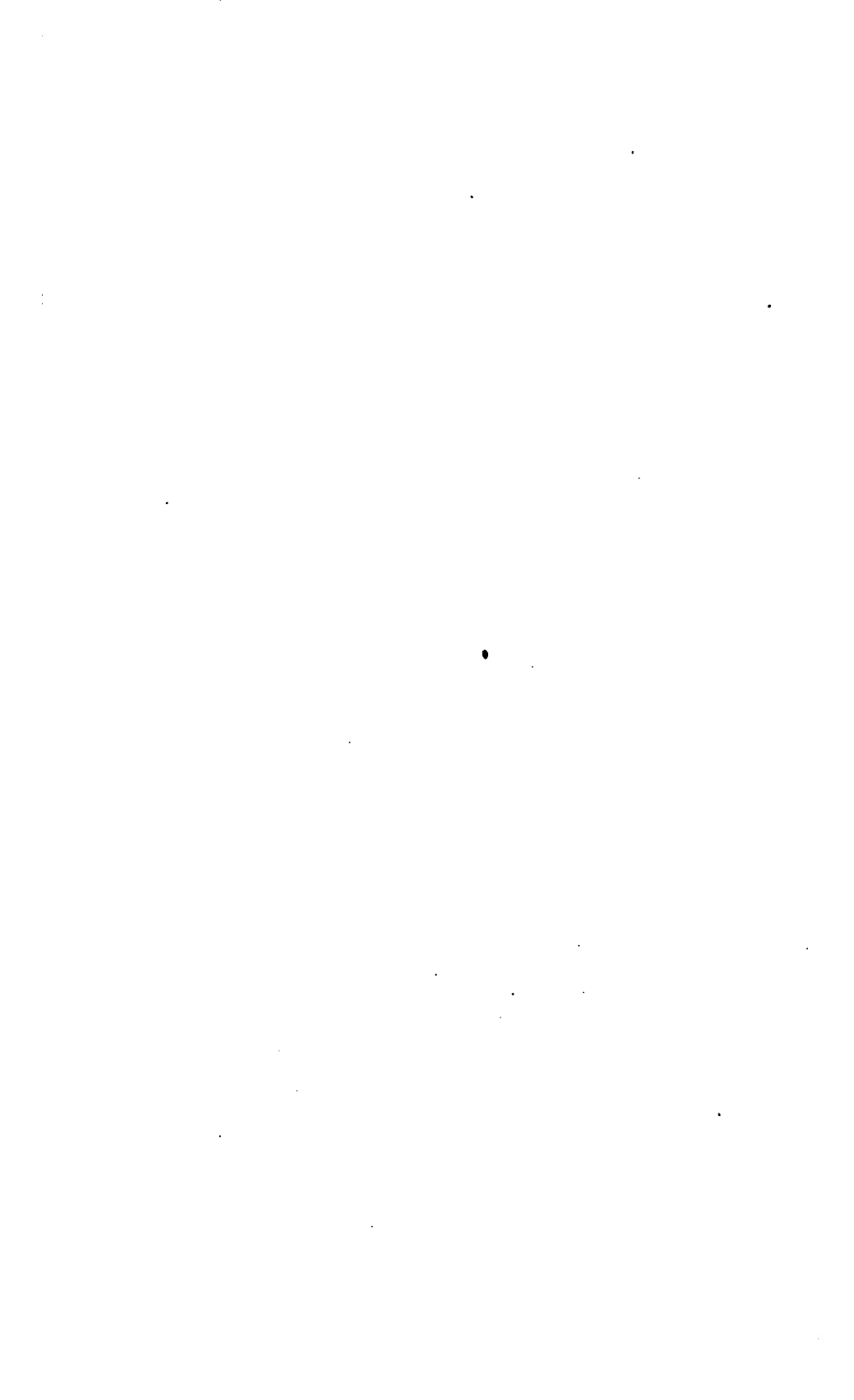
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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

CHARLES A. TUTTLE,
REPORTER.

VOLUME 27
WITH
NOTES ON CAL. REPORTS

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OCTOBER TERM, 1864.



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OCTOBER TERM, 1864.

GEORGE F. HOOPER *v.* WELLS, FARGO & CO.

COMMON CARRIERS AND FORWARDERS.—The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different.

LIABILITY OF COMMON CARRIERS.—The common carrier who undertakes to carry goods for hire is an insurer of the property intrusted to him, and is legally responsible for acts against which he cannot provide, from whatever cause arising; the acts of God and the public enemy alone excepted.

LIABILITY OF FORWARDERS.—Forwarders are not insurers, but they are responsible for all injuries to property, while in their charge, resulting from negligence or misfeasance of themselves, their agents or employés.

RESTRICTIONS ON COMMON LAW LIABILITY OF COMMON CARRIER.—Restrictions upon the common law liability of a common carrier, for his benefit, inserted in a receipt drawn up by himself and signed by him alone, for goods intrusted to him for transportation, are to be construed most strongly against the common carrier.

RESTRICTING CLAUSE IN COMMON CARRIER'S RECEIPT.—If a common carrier, who undertakes to transport goods, for hire, from one place to another, "and deliver to address," inserts a clause in a receipt signed by him alone, and given to the person intrusting him with the goods, stating that the carrier is "not to be responsible except as forwarder," this restrictive clause does not exempt the carrier from liability for loss of the goods, occasioned by the carelessness or negligence of the employés on a steamboat owned and

Argument for Appellants.

controlled by other parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of conveyance. The managers and employes of the steamboat are, in legal contemplation, for the purposes of the transportation of such goods, the managers and employes of the carrier.

CONSTRUCTION OF COMMON CARRIER'S RECEIPT.—A receipt signed by a common carrier for goods intrusted to him for transportation for hire, which restricts his liability, will not be construed as exempting him from liability for loss occasioned by negligence in the agencies he employs, unless the intention to thus exonerate him is expressed in the instrument in plain and unequivocal terms.

AMENDMENT OF COMPLAINT AFTER VERDICT.—Under our Practice Act a complaint cannot be amended in this Court so as to make it correspond with the verdict. The District Court, in a proper case, before judgment, may direct the complaint to be so amended.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The complaint did not ask judgment for or allege the damages at a sufficient amount to include interest on the value of the bullion.

The verdict of the jury included interest.

The other facts are stated in the opinion of the Court.

Delos Lake, and A. Campbell, for Appellants.

If the defendants are to be deemed common carriers, then, by the agreement under which the treasure was received in this case, their responsibilities and duties were limited to those of forwarders only.

The term "forwarder," or "forwarding merchant," has a well defined and ascertained meaning. A forwarder of merchandise, or forwarding merchant, is one whose business is to receive and send forward goods to their place of destination by the usual modes of public transportation. His character is that of a depository for hire in storing, and that of an agent in forwarding the goods. (Edwards on Bail. 293; *Roberts v. Turner*, 12 John. 233.)

A forwarder of merchandise is discharged from liability on showing that he used ordinary diligence and prudence in sending on the property by responsible persons engaged in the carrying business. (Edwards on Bail. 294; Angell on Car.

Argument for Appellants.

§ 75, p. 81; Story on Bail. § 444; 2 Kent, 591-2; *Platt v. Hibbard*, 7 Cow. 497; *Brown v. Dennison*, 2 Wend. 593; *Ackley v. Kellogg*, 8 Cow. 223; *Roberts v. Turner*, 12 John. 233.)

Delos Lake, and *John H. Saunders*, also for Appellants.

All the cases agree that a receipt, delivered and received under like circumstances, is a contract. (See *Parsons v. Monteath*, 13 Barb. 353; *Dorr v. N. J. Steam Nav. Co.* 1 Ker. 485; *Moore v. Evans*, 14 Barb. 524; *Wells v. The Steam Nav. Co.* 2 Comst. 204; Same case, 4 Selden, 375; *Holford v. Adams*, 2 Duer, 480.)

In each of these cases, the contract was a receipt or a "permit" signed only by the carrier; and in each case the document was held to be a valid and binding agreement. In the case of *Dorr v. New Jersey Steam Nav. Co.* (*supra*) the Court say: "The exception to the common law liability being made in the bill of lading and delivered to the agent of the plaintiff, must be deemed to have been agreed upon by the parties."

Did the contract, by its terms, discharge the defendants from all liability for loss caused or occasioned solely by the negligence of those in charge and having the management of the tug boat? The language of the contract is: "It is further agreed, and is part of the consideration of this contract, that Wells, Fargo & Co. are not to be responsible, *except as forwarders*, nor for any loss, or damages arising from the *dangers* of railroad, ocean, or river navigation, fire, etc." The respondent's counsel contend that the word "forwarders," as "used in the contract should be construed to mean, not technical forwarders, but such forwarders as expressmen are."

The contract, and every clause of it, must be presumed to have some meaning. Like all other agreements, it must be construed in the light of existing facts and circumstances at the time it was made. Interpreted by such existing facts and circumstances, then what did the parties mean by their contract? What are the facts?

Argument for Appellants.

The defendants are a company engaged in the regular business of an express company, in receiving, forwarding, carrying, and delivering, by sea or by land, treasure, goods, and packages, for hire, in care of their own messengers, in vessels, conveyances, steamers, boats, and vehicles, owned by others, and ordinarily used by the public at large as the common and public mode of transportation and conveyance. They have no interest in, or control over, these public vehicles, nor any voice in their management, nor control over the actions of those having their management. In case of negligence the most apparent, threatening disaster the most fearful, they are as powerless to prevent as any other stranger; and yet, in their character of common carriers, they are liable for all injuries to property which they have undertaken to transport, resulting from the negligence or unskilfulness of those who are employed in the navigation of steamers, boats, or vessels, or in the running of railroad cars or public stage coaches. This both parties well knew, and they also knew that accidents frequently occur, resulting from carelessness of engineers, and others engaged in navigating steamboats on ocean and river. In the light of all these facts, the defendants say, "We will take charge of your treasure, and will guard it on its passage, but inasmuch as we are compelled to use agencies, over which we have no control, we will only undertake to exercise proper care and prudence in the selection of the proper public vehicle, and we will not be responsible for the acts of the agents, nor accidents to the agencies, over which we not only have not, but are not permitted to have, any control." The words selected to express this meaning are apt and proper.

The term "*forwarder*" has a well defined and ascertained meaning. A forwarder of merchandise is one whose business it is to receive and send forward goods to their place of destination by the usual modes of public transportation. And he is discharged from liability on showing that he used ordinary diligence and prudence in sending on the property by responsible persons engaged in the carrying business.

The defendants agreed "to forward and deliver to address,"

Argument for Appellants.

and "not to be liable except as forwarders." Their agreement to forward did not oblige them to transport this bullion in their own vehicles, or in vehicles over which they exercised control. It was no breach of contract on their part to employ the ordinary public conveyances, such as the *Ada Hancock*.

Supposing the *Ada Hancock*, then, to have been, to all appearance, a safe and proper vehicle, the defendants were in the course of fulfilling their contract "to forward" when the explosion took place, and the bullion was lost through the fault of the engineer. They agreed "to forward," and they proceeded to do so.

If "to forward" in the contract is to be read "to carry," and "forwarders" to be changed into "carriers," the defendants must fail, for they admit that if their contract makes them common carriers, they are liable in this action.

If the contract of the defendants, properly interpreted, does not make them liable as carriers, there was nothing in the service they rendered in respect to this bullion to fix that character upon them. They dispatched it *en route* to the place of its destination on board a steam tug, a public vehicle, over which they had no control, and in which they had no interest, taking the additional precaution of sending a messenger to accompany it in its transit. This is the service of a forwarder, and not of a common carrier; and any one doing business simply and exclusively under the denomination of a forwarder would not have been liable under the circumstances of this case. (*Roberts v. Turner*, 12 Johnson, 232.)

Whatever is the true interpretation of this contract, it may be well to bear in mind that the loss of the bullion has in no respect affected its signification. What did its language fairly import at the time it was entered into, in view of the facts of this case? The statement sets forth that the defendants in transacting their business, employed vehicles owned by others, and used by the public at large. Of course this was known to the plaintiff, and he knew therefore that this bullion must necessarily be subjected in its transit to operations and agencies over which the defendants had no control. He knew

Argument for Respondent.

that the defendants had no more authority over the Ada Hancock or the steamer Senator than he had himself. When with these facts before him he delivers his bullion to the defendants, and they agree to "forward to San Francisco, and deliver to address," stipulating "not to be liable except as forwarders," the meaning of the contract seems too clear for dispute, unless we examine its terms under the influence of the preconceived idea that the defendants were carriers in spite of their contract, and could not be liable in any other capacity.

H. & C. McAllister, for Respondent.

Express companies are common carriers. This proposition is fully sustained by the following authorities: *Haslam v. Adams Express Co.*, 6 Bosworth, 241, 242, 244; *Place v. Union Express Company*, 2 Hilton, 19, 25, 26; *Russell v. Livingston*, 10 Barb. Sup. Ct. R. 346, 352-355; *Read v. Spaulding*, 5 Bosworth, 395, 404; *Mercantile Mutual Insurance Co. v. Chase*, 1 E. D. Smith, 115, 121-125; *Baldwin v. American Express Co.*, 23 Illinois, 198; *Stadhecker v. Combs*, 9 Richardson, 193, 199, 200; *Redfield on Railways*, 240, 241; *Adams & Co. v. Blankenstein*, 2 Cal. 413, 418; *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185.

Whether common carriers use their own vessels or those of others in no way varies or modifies their responsibility. (*Wilcox v. Parmlee*, 3 Sandf. 610; *Fairchild v. Slocum*, 19 Wend. 332; *Place v. Union Express Co.*, 2 Hilton, 26; *Krender v. Wolcott*, 1 Hilton, 223; *Russell v. Livingston*, 19 Barb. 352.)

If the receipt of the defendants be considered a contract, binding upon plaintiff, and otherwise valid and operative, still, the exceptions and restrictions therein contained must be construed strictly and *fortius contra proferentem*.

It is a familiar maxim of the law that *verba chartarum fortius accipiuntur contra proferentum*.

They who choose the words, frame the language, draft the

Argument for Respondent.

instrument, and execute it, ought rather to be held to a strict interpretation of the paper than he who merely accepts it.

This rule of construction is especially applicable to deeds, poll, or other instruments of unilateral execution. When there is an indenture, the reason of the rule becomes less obvious; but even in such case, words of exception or reservation are regarded as the language of the party in whose favor the exception or reservation is made. If a deed may inure to several different purposes, he to whom it is made may elect in which way to take it. So, it has been held, that if an instrument may be either a bill, or a promissory note, the holder may elect which to consider it.

Munn v. Baker, 2 Starkie's N. P. C. 255 (3 Eng. Common Law, 339) *Syllabus*: "A carrier who gives two notices, limiting his responsibility, is bound by that which is least beneficial to himself." (*Barney v. Prentiss*, 4 Har. & Johns. 317; *Beckman v. Shouse*, 5 Rawle, 179; *Eagle v. White*, 6 Whart. 505.)

The word "forwarders," as used in the receipt, should be construed to mean not technical forwarders, but such forwarders as expressmen are.

The counsel of defendants lay great stress upon that clause of the receipt which reads "*that Wells, Fargo & Co. are not to be held responsible except as forwarders;*" in fact, it is their sole reliance. They admitted, on the oral argument, that they could make no claim for exemption under those additional words, to wit: "*nor any loss or damage arising from the dangers of railroad, ocean, or river navigation, fire, etc.*"

The position of the defendants, as we understand it, is that by using in the receipt the language, "*Wells, Fargo & Co. are not to be responsible, except as forwarders,*" they became forthwith relieved from all the responsibilities of a common carrier, the entire nature of their vocation became changed, and their whole duty was reduced to shipping the packages and treasure intrusted to them by the ordinary channels of conveyance. That then their obligation ended, and their service was completed. No matter what the subsequent fate of the goods;

Argument for Respondent.

no matter how gross the negligence, how criminal the fraud by which they were lost in process of transportation, there was no liability on the part of the express company.

The gross injustice of any such construction is obvious. Its mere statement shocks the legal as well as the moral sense.

Express companies are not employed for any such pretended purpose. They are paid, not in order to commit to others for transportation the thing bailed to themselves, but that *they* may carry and deliver it. They receive a higher freight than ordinary bailees, because they profess to exercise a closer custody of, a more special supervision over the goods intrusted to them than does the ordinary carrier.

The packages bailed to them are generally of small bulk, but of great value; they remain during the entire transportation in the personal charge of the express messenger, and their delivery is made, not at the wharf or warehouse, as in the case of ordinary goods, but specially by the express employé at the office or residence of the consignee.

So far from merely forwarding the goods, merely delivering or shipping them by the usual channels of conveyance, their custody begins before that of the ordinary carrier, (for express packages are taken in charge, not at the stage or steamer, but at the express office,) is conducted throughout the journey more specially and carefully, and continues after the duties of the ordinary carrier have ceased.

In the present case, was the contract merely *to forward* the treasure? The receipt reads, "*Received of Geo. F. Hooper, dust and bullion package, value ten thousand seven hundred and fifty-five dollars, address, Geo. F. Hooper, which we agree to forward to San Francisco, and deliver to address.*"

The word "*forward*" is used in the sense of *transport*, and the whole contract in its language, in its effect, in its compensation, in all its elements, is utterly dissimilar to that of a *technical forwarder*. To particularize:

1. The defendants were to receive the whole of the consideration of carriage and delivery, to wit: eighty dollars and sixty-five cents.

Argument for Respondents.

2. Freight was charged by the defendants for the whole route.

3. The treasure was never delivered to the officers or employés of the steam tug.

4. The package remained in the exclusive custody of the express messenger, the servant of the defendants, and was so at the time of the loss.

5. The package was in the treasury box of the defendants during the transportation and at the time of the loss, and this treasure box was in the special charge of the express messenger.

6. No freight was paid the steam tug for the carriage of the treasure; no contract was made with the steam tug for its transportation; no notice of its existence on board was given to the officers or employés of the steam tug; its presence brought neither recompense nor responsibility to the steam tug.

7. Suppose, instead of travelling by the steam tug, the messenger had hired a row boat to put him on board the Senator, and the treasure had been lost from the row boat, would the owner of the boat have been the carrier, and the defendants mere forwarders?

8. The party who carries is, in the eye of the law, the party who has the profits of carrying. Of necessity, all others acting in the transportation must be agents of him who has the benefit. Shall a party have all the profits of an enterprise, and then evade all its responsibilities?

9. Who did undertake to carry this treasure? Some one did. Was it the defendants, who distinctly contracted to *forward and deliver it*, or was it the steam tug, whose officers and employés had no control over it, and did not even know of its existence on board? (*Stadhecker v. Combs*, 9 Richardson, 199, 200; *Reed v. Spaulding*, 5 Bosworth, 396; *Mercantile Ins. Co. v. Chase*, 1 E. D. Smith, 121; *Blossom v. Griffin*, 3 Kernan, 571; *Sweet v. Barney*, 24 Barb. 533.)

As to *technical forwarders*, their vocation, compensation, and liabilities, *vide* Angell on Carriers, Sec. 75.

Opinion of the Court.

Clearly, the business of defendants is not that of *technical forwarders*. Upon general principles, by numerous adjudications, by the judgment of this very Court, they are common carriers. Neither did they temporarily assume, or contract for a different character in this particular transaction. They received the bullion of plaintiff, and agreed to transport and deliver same, in the ordinary course of their business, and under their usual printed form of receipt. They agreed in the first part of that paper to assume all the duties of a common carrier as to the gold dust, "*to forward and deliver*" it; and here, the word forward is manifestly used in the sense of carry, or transport.

Upon the very threshold of their contract, therefore, they disclaim all character as *technical forwarders*; and yet, we are told, that in the latter part of the same contract, they declare themselves such. Why should the second use of the word *forward* (that is, *forwarders*) have a different meaning from that which it *must* bear when first used? If the verb *forward* is used to signify *to carry and transport as an express company*, why should not the noun, *forwarder*, in the same paper, be taken in the same sense; that is, *not to be responsible except as express carriers and transporters*?

Shall the word *forward* when first used, be taken according to its natural meaning, and then immediately thereafter a *technical* signification to be ascribed to the word *forwarders*?

Shall this be the construction, in view of the rule that words are to be taken in their plain and popular sense? (4 East, 135; 3 Kern. 574.)

By the Court, SAWYER, J.

This is an action to recover the sum of ten thousand seven hundred and fifty-five dollars, the value of a package of gold bullion delivered to defendants, at Los Angeles, to be transported to San Francisco, and which was lost in consequence of the explosion of the boiler of the steam tug, "Ada Hancock," while being transported in charge of defendants' mes-

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senger from the shore, at San Pedro, to the anchorage of the steamer, "Senator."

The plaintiff, to maintain the action on his part, proved that "the defendants were, and are a company engaged in the public express business; that is to say, in receiving, forwarding, carrying and delivering, by sea or by land, for any one who employs them, treasure, goods and packages for hire from place to place within and without this State, in care of their own messengers, in vessels, and conveyances, and steamers, and boats, and vehicles, owned by others, and ordinarily used by the public at large, as the common and public mode of transportation and conveyance.

"That said defendants had an agency and an agent at Los Angeles for the purposes of their said public express business; their principal office and agency for the State of California being at San Francisco.

"That the usual modes of public conveyance and transportation between Los Angeles and San Francisco were, at the time hereinafter mentioned, and for a long time prior thereto, by a line of stage coaches the whole way, and also by stage coach from Los Angeles to San Pedro, and from San Pedro to San Francisco by a steamer called the 'Senator;' that an agent of the defendant always travelled on said steamer, 'Senator,' between San Francisco and San Pedro, who, on arriving at San Pedro, proceeded to Los Angeles by stage coach, and there received from the Los Angeles agent all express matter that had been left there to be forwarded, carried and delivered, returned with such express matter to San Pedro in time for the steamer, 'Senator's' return voyage, placed and shipped the express matter on board of such steamer, and returned on the steamer with the express matter in his charge to San Francisco, where it was in the first instance delivered at the general agency, and then delivered by such agency to the consignees or owners.

"That it was usual and customary for the steamer, 'Senator,' and all other coast steamers, on arriving at or approaching San Pedro, to anchor some three miles from shore, there not

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being sufficient depth of water to enable such vessels to approach the shore. That the usual means and mode of transporting goods and passengers between the shore and steamer was by steam tug and lighters.

"That one of such usual and ordinary means was by a steam tug boat of about forty-two (42) tons burden, called, the 'Ada Hancock;' that is, it was usual and customary for the defendants' messenger to go from the shore to the steamer with the express treasure in charge on said tug boat, the heavier express freight being usually transported on lighters. That the express company was charged by the steamer the usual price for the passage of the express messenger and freight for all express goods, except treasure, which was carried in an iron box called the treasure-box, and was kept in the special charge of the messenger while on board the steamer, and no charge made by the steamer for its transportation.

"That as to any and all treasure transported by defendants upon said steam tug, 'Ada Hancock,' or upon said steamer, 'Senator,' no bill of lading was ever given, and no written contract of affreightment was ever made therefor, neither was any note or memorandum in writing of the true character or value thereof ever given by the defendants, or by their agents or servants, to the master, or officers, or agent, or owner of said steam tug, or said steamer, 'Senator.' That no freight was ever paid by or charged against defendants or their agents for treasure laden by them on board said steam tug to or from said steamer, 'Senator.' That the defendants used the usual means of public transportation in conducting their business, which was notorious, and known to the plaintiff at the time hereinafter stated.

"That on the 21st day of April, 1863, the plaintiff delivered at the City of Los Angeles, California, to the agent of the defendants at Los Angeles, a package of gold bullion of the value of ten thousand seven hundred and fifty-five dollars, (\$10,755) to be transported to San Francisco in consideration of the sum of eighty dollars and sixty-five cents, then and there agreed to be paid to defendants by plaintiff, and on such deliv-

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ery received and accepted from said agent a paper, partly printed and partly written, of which the following is a copy, the portion thereof italicised being written, and the portion thereof not italicised being printed, namely:

“ ‘ WELLS, FARGO & CO.’S EXPRESS.

“ ‘ Wells, Fargo & Co.,

“ ‘ Express,

“ ‘ Los Angeles.

“ ‘ Value, \$10,755.

April 21, 1863.

“ ‘ Received of *George F. Hooper, dust and bullion.* Package, value *ten thousand seven hundred and fifty-five dollars.*

“ ‘ Address, *Geo. F. Hooper*, which we agree to forward to *San Francisco*, and deliver to *address*.

“ ‘ In no event to be liable beyond our route as herein receipted. It is further agreed, and is part of the consideration of this contract, that Wells, Fargo & Co. are not to be responsible except as forwarders, nor for any loss or damage arising from the dangers of railroad, ocean or river navigation, fire, etc., unless specially insured by them, and so specified on this receipt. For the proprietors,

“ ‘ P. BANNING, Agent.

“ ‘ Charges Col., \$80 65.

Per SANFORD.’

“ Said package of gold bullion of the value of ten thousand seven hundred and fifty-five dollars has never been delivered by defendants to plaintiff, or to his address.”

Defendants’ agent, at Los Angeles, delivered said bullion to one Ritchie, the messenger, or traveling agent of defendants between Los Angeles and San Francisco, who took charge of the same and transported it to San Pedro by public stage coach. For the purpose of placing said bullion and other treasure on board the steamer, “Senator,” which then lay at anchor, as usual, off the shore, for transportation to San Francisco, said Ritchie placed it on board the steam tug, “Ada Hancock,” himself accompanying the bullion and having it in charge. Soon after, said steam tug having on board said bul-

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lion, said Ritchie and several other passengers for San Francisco, started from the wharf for the purpose of placing said passengers, bullion, etc., on board said steamer, "Senator." Before reaching the anchorage of the "Senator," the boiler of said steam tug exploded, whereby the said Ritchie and several other passengers were killed, and said bullion lost. There was evidence tending to prove, that the explosion was caused by the carelessness of the engineer, and other officers of the said steam tug. - Defendants had no interest in said steam tug, and no control over her management or navigation. The agents of defendants at Los Angeles had no authority to insure said bullion. The plaintiff had no option as to insuring, or not insuring the same with defendants at Los Angeles. Insurance could only be effected thereon with said defendants at their office in San Francisco.

The Court gave the jury the following instructions:

"First — That if defendant be an express company, publicly engaged in transporting freight from one place to another, for hire, they are common carriers, and subject to all the responsibilities of common carriers, except so far as they have modified them by agreement.

"Second — That the mere fact that an express company use their own vessels and steamers, or the vessels or steamers of others, in no way affects their liabilities as common carriers.

"Third — That if Wells, Fargo & Co. shipped the treasure in question on board the steamer, 'Ada Hancock,' and there was an explosion of said steamer, by which the treasure was lost, and that explosion was occasioned by the negligence of the parties in charge of the 'Ada Hancock,' then, Wells, Fargo & Co. are liable for the value of said treasure.

"Fourth — An express company which is in the habit of carrying, for hire, packages containing coin, dust and other articles of value, from one place to another, is a common carrier.

"Fifth — Express companies which carry packages over

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routes where they employ other vehicles or means of conveyance than their own, are common carriers.

"Sixth — They may, however, by contract, limit their liability as common carriers, and if you find by the evidence that the defendants in this case did so limit their liability to the plaintiff, then the Court charges you that such limit of responsibility must govern; but that does not relieve defendants from ordinary care in the discharge of their duties.

"Seventh — The special agreement received in evidence cannot exempt defendants from accountability for losses occasioned by a defect in the vehicle or mode of conveyance used to effect the transportation.

"Eighth — If you find, from the evidence, that defendants undertook to forward the gold dust in question from Los Angeles, and deliver the same to plaintiff, at San Francisco, under a special agreement limiting the liability, defendants must be deemed to have undertaken the same degree of responsibility as that which attached to a private person, and were, therefore, bound to use ordinary care in the custody of the gold dust, and its delivery, and to provide proper means of conveyance for its transportation.

* * * * *

"Tenth — Should you find that the defendants shipped the treasure on board the steamer *Ada Hancock*, and there was an explosion of said steamer by which the treasure was lost, and that the explosion was occasioned by the negligence of the persons in charge of her, then defendants are liable for the value of the said treasure, by reason that they are responsible for injuries caused by the negligence of the agencies they employ in fulfilling the obligations of their undertaking."

The Court also refused the following instruction asked on the part of defendants, to which refusal defendants excepted:

"That if the defendants, by their agents, selected the steam tug *Ada Hancock* for transportation of the treasure from the wharf to the Senator, and the jury find that at the time of such selection and of placing the treasure on board, the said

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tug was sufficient for the purpose of such contemplated transportation, then that the defendants are not responsible if the treasure was lost by any subsequent carelessness of the officers of the boat."

It is admitted by appellants' counsel that defendants, as to the transportation of said bullion, were acting in the capacity of common carriers; and such was undoubtedly their legal relation to said bullion at the time of its loss. It is further admitted—and this proposition also admits of little doubt—that defendants, under the law applicable to common carriers, are liable for its loss, unless such liability is restricted by the express stipulations of the contract between the parties for the conveyance of said bullion.

It is insisted, however, on the part of defendants, that the contract contains express stipulations which exonerate them from all liability for the loss under the circumstances disclosed by the record; while on the part of plaintiff, this proposition is controverted. If mistaken on this point, it is further claimed by the plaintiff, that any stipulation in a contract which purports to exonerate a common carrier from loss resulting from the carelessness, negligence or misfeasance of the carrier, or of his servants or agents, is contrary to the policy of the law and void. It is not pretended—and it could not with any show of reason be pretended—that the loss in question is within the meaning of the last clause of the receipt set out in the record relating to the dangers of navigation, etc. The clause relied on by defendants to relieve themselves from responsibility is as follows: "It is further agreed, and it is a part of the consideration of this contract, that Wells, Fargo & Co. are not to be responsible except as forwarders."

The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different. "The common carrier who undertakes to carry goods for hire, is bound to deliver them at all events, unless injured or destroyed by the act of God, or the king's enemies." (Edwards on Bail, 295.) "A common carrier is regarded by the law as an insurer of the property intrusted to him; or in

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other words, he is legally responsible for acts against which he could not provide, from whatever cause arising, the acts of God and the public enemy only excepted." (Angell on Carriers, Sec. 67.) There are many accidents against which common carriers cannot protect themselves by the exercise of the utmost care and skill on the part of themselves and their employés, for the result of which they are nevertheless responsible. (Ed. on Bail., 454, *et seq.*, and Angell on Carriers, Chap. 11, and cases cited.) But the liability of "forwarders," is like that of warehousemen and common agents, and is governed by the general rule applicable to other bailees for hire not subject to extraordinary liabilities. They are responsible for ordinary care, skill and diligence—that is, such care and diligence as prudent men in similar circumstances usually exercise in the management of their own business. (Story on Bail., Sec. 444.) They are not, it is true, insurers like common carriers, but they are responsible for all injuries to property while in their charge resulting from negligence, or misfeasance of themselves, their agents or employés. In view of these principles governing the liabilities of "carriers" and "forwarders," what is the effect of the disputed clause in the contract under consideration upon the rights of the parties, plaintiff and defendants? What is the extent of the restriction upon the common law liabilities of the defendants? The language must be taken most strongly against the defendants. (Edwards on Bailments, 492.) The instrument is executed by them alone. It was drawn up with care, in language selected by themselves, the blank form having been printed in advance ready to be presented to all persons offering property for transportation by their express. The restrictions were for their benefit. The owners of packages sent by express rarely examine with care, or indeed have an opportunity to critically consider, the terms of the receipt presented to them; and general terms, under such circumstances, are apt to mislead. These are some of the reasons for the rule given in the books. In construing a covenant in a charter party, Mr. Justice Curtis said: "The rule of construction as to exceptions is, that

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they are to be taken most strongly against the party for whose benefit they are introduced. * * * These words of exception being introduced by the covenanter for his own benefit, if they are capable of bearing a more or less extended meaning, the rule requires that meaning to be allowed to them which is least beneficial to the covenanter." (*Aiery v. Merrill*, 2 Curtis, 11.) And Mr. Chief Justice Gibson, in *Atwood v. Reliance Transportation Company*, 9 Watts, 88, in relation to a restriction in a contract by a carrier, said: "Though it is perhaps too late to say that a carrier may not accept his charge in special terms, it is not too late to say that the policy which dictated the rule of the common law requires that exceptions to it be strictly interpreted, and that it is his duty to bring his case strictly within them." And such is the well settled rule of construction in such cases.

The contract of defendants is not merely to forward the bullion, but to "forward to San Francisco *and deliver to address.*" They are not merely to start it upon the way by some suitable conveyance, but are to see that it reaches its destination, and are to "deliver to address." They were undoubtedly common carriers, and not forwarders in the technical sense of the term. But there was an evident intention on the part of defendants to restrict their liability, and, although they were acting in the capacity of carriers, they stipulated that they were "not to be responsible except as forwarders." As we construe this clause, it does not mean that defendants would start the package upon the way by some suitable conveyance, and that thereupon their responsibility should cease, for that would be directly in conflict with the covenant to "deliver to address." It simply means, that defendants would not assume the extraordinary responsibilities of a common carrier, and become an insurer of the goods, except as against loss resulting from the act of God or public enemies. There is no express covenant or exception against loss by negligence on the part of defendants, or of those employed by them in the transportation of their express matter. The exception fixes the limit of responsibility by referring to another class of bailees,

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whose responsibilities are different from those of carriers; and the meaning, as we construe the restrictive clause, is, that they will be governed in respect to their liabilities by the same principles as those applicable to forwarders. It is manifest that it was not intended by this clause that all responsibility should cease as soon as the package was started upon its passage from the office of defendants at Los Angeles; for the receipt also contains the clause, "In no event to be liable beyond our route as herein receipted." The route as therein receipted extended to San Francisco. The printed form of the instrument used in this case was evidently framed with a view to general use, where the point of destination was beyond, as well as within the routes established and used by defendants. Evidently it was contemplated, that defendants might be liable for a loss occurring on their "route." If it was intended to release themselves from all responsibility while the package should be in transit, this clause would doubtless have been made to read, "In no event to be liable for any loss arising after leaving our office at Los Angeles," or some other language of equivalent import. The defendants were carriers, and the bullion was lost while in their possession in the character of carriers. It was not received to be stored, or to be started upon its passage merely, by the first convenient opportunity; but to be carried and delivered "to address," and for no other purpose. There was no point at which defendants were in fact mere forwarders, in the technical sense of the term, or in which they were warehousemen. The goods were never in their possession in such character, but in the character of carriers only. They could not be liable in a character which they never occupied; and their contract, that while they are carriers, they shall only be liable "as forwarders," in connection with the other language of the instrument, can only mean that the liability shall be governed by the principle of law applicable to forwarders; that is, that they shall only be liable for losses arising from a want of ordinary care on the part of themselves, and in the agencies made use of by them in the exercise of their ordinary business of carriers.

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The word "as," is defined in the last edition of Webster's Dictionary as follows: "Like; similar to; of the same kind, or in the same manner; in the manner in which." And this is obviously the ordinary import of the word standing in relations similar to that in the instrument under consideration. Defendant's liability was to be "similar to" that of forwarders—"of the same kind." They were to be liable "in the same manner"—"in the manner in which"—forwarders are liable. In what manner are forwarders responsible? Of what kind is their liability? They are not insurers, like carriers, but they are liable for losses of goods while in their custody resulting from negligence of themselves and those whom they employ in their business of forwarders. And if a forwarder, or warehouseman, instead of using his own warehouse, and employing his own subordinates, should, for a stipulated sum paid to the owner, use in his business the warehouse of another person, who employs and controls the subordinates, there can be no doubt that he would be liable for a loss of the goods intrusted to his care occurring while in his possession, and resulting from the negligence of such subordinates, although not under his control. If the liability of these defendants under their contract is to be "similar to" that of forwarders—if it is of "the same kind"—if they are to be responsible "in the same manner," then they are liable for any loss resulting from the negligence of themselves, or negligence in the agencies employed by them, while the bullion was in their custody and control; and that custody, without doubt, continued up to the moment of the loss, and would have continued but for the loss up to the time when it would have reached its destination, and been delivered "to address." The fact that defendants made use of various public conveyances, their messenger with the treasure travelling a part of the way by stage, a part by steam tug and lighters, and a part by ocean steamer, makes no difference as to their liability. For defendants' purposes the managers of those various conveyances were their agents and employés. Defendants had the means of holding the proprietors of those various vehicles used in their business

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of expressmen responsible to them, had they chosen to do so. If they did not take the proper means to secure themselves, it was their own fault. The defendants, although employing public conveyances, were still carriers having the actual custody and management of the treasure during the transit, as well as while it remained at the office of defendants at the extremities of their route. Ritchie, the messenger of the defendants, was in the actual custody of the treasure during the transit. Suppose, by the carelessness of Ritchie in transferring the treasure from the steam tug to the "Senator," it had been dropped into the ocean and lost, can it be pretended that the defendants would have been exempt from liability under the restrictive clause of their contract under consideration? Would it be claimed, in such case that the liability of defendants ceased as soon as the treasure left their office at Los Angeles? We do not think any such construction would be claimed for the stipulation. If the defendants would not be protected by the exception against loss from the negligence of one of their servants, why should it protect them against the negligence of another, who as to the same matter is in law their servant or agent. Both are, in contemplation of law, the agents or employés of defendants, and the acts of both are the acts of defendants, and the language of the restrictive clause under consideration no more excludes the liability resulting from the negligence of one than from that of the other.

The defendants were common carriers, but under the contract they were carriers with limited responsibilities. There is an ample margin for the operation of the clause restricting the defendants' liability in the numerous accidents and losses not arising out of negligence, or malfeasance, and not even comprehended in the exception, "damages arising from the dangers of railroad, ocean or river navigation, fire," etc., against which the carrier is an insurer, and from which forwarders are exempt.

Much stronger language has been held not to exempt bailees from losses arising from negligence. To justify the conclusion that such exemption is contemplated, the language should

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be unequivocal, and susceptible of no other reasonable interpretation. In *Wells et al. v. Steam Navigation Company*, 8 N. Y. (4 Seld.) 375, the contract for towing a vessel from New York to Albany contained the clause "at the risk of the master and owners thereof." Although persons engaged in towing vessels have, in New York, been held not to be common carriers, the defendants in that case were still held to be liable for damages resulting from the carelessness of those engaged in towing the vessel, notwithstanding this restriction in their contract. Mr. Justice Mason said: "I cannot think the expression contained in it, 'at the risk of the master and owners thereof,' was understood by the parties as a protection against all kinds of negligence. It would be an extraordinary contract, which should in express terms give such a latitude in performing a kind of service of so important a character as the one under consideration; and to permit a contract to have so unreasonable an effect as it would imply, the intention of the parties should be clearly and unequivocally expressed, so as to leave no room for doubt or misconstruction. (6 John. 180; 7 Hill, 547.) In this contract nothing is said about negligence." (Page 379.) In the same case, Mr. Justice Gardiner, referring to *Alexander v. Greene*, 7 Hill, 544, said (page 382): "We held then if a party vested with a temporary control of another's property for a special purpose of this sort would shield himself from responsibility, on account of the gross negligence of himself and servants, he must show his immunity on the face of his agreement; and that a stipulation so extraordinary, so contrary to the general custom and the understanding of men of business, would not be implied from a general expression, to which effect might otherwise be given" — and that he saw no reason now for changing this rule. So, also, in *Schieffelin v. Harvey*, where goods shipped to England were "returned to the shippers at their own risk," and were purloined from the ship, the owner of the ship was held liable. The Court say: "It is undoubtedly true that the general operation of law may be controlled by the agreement of the parties. But such agreement ought to be clear and

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capable of but one construction, unequivocally and necessarily evincing that such was the intention of both the parties." (6 John. 180.) A similar rule is stated in *Buckman v. Shouse*, 5 Rawle, 189. As further instances of the application of the rule to restrictive clauses in the contracts of carriers, see *Sager v. P. S. & P. E. R. R. Co.*, 31 Maine, 238, 239; *De Rothschild v. Royal Mail Steam Packet Co.*, 7 Exchequer R. 734.

So, also, in the case of the *New Jersey Steam Navigation Company v. Merchants's Bank*, in the Supreme Court of the United States, 6 How. 344. The contract provided that: "The following conditions are stipulated and agreed to as part of this contract, to wit: The said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the New Jersey Steam Navigation Company will not, in any event, be responsible either to him or his employers, for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any or every description, to be conveyed or transported by him in said crate or otherwise, in any manner, in the boats of the said company. Further, that the said Harnden is to attach to his advertisements, to be inserted in the public prints, as a common carrier, exclusively responsible for his acts and doings, the following notice, which he is also to attach to his receipts or bills of lading, to be given in all cases for goods, wares and merchandise, and other property committed to his charge, to be transported in said crate or otherwise:

"Take Notice—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to the proprietors of the steamboats in which his crate may be and is transported, in respect to it or its contents, at any time."

Mr. Justice Nelson, in construing this contract says, (p. 383): "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agree-

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ment, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands. * * * If it is competent at all for the carrier to stipulate for the gross negligence of himself, and his servants, or agents, in the transportation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties."

To apply these principles to the case in hand, we think it cannot be said that the contract in question in clear and unequivocal terms necessarily evinces an intention on the part of both parties, or of either party, that defendants shall be exonerated from any loss resulting from negligence in the agencies employed by them in the transportation of treasure committed to their care. If such had been the intention, it certainly could, and doubtless would have been expressed in language about which there could be no misapprehension by either party. Nothing is said about negligence. The language used is not such as necessarily expresses, or as men would ordinarily employ to express the idea now claimed for it, and if so used, it would be likely to mislead a party to whom it is tendered ready executed upon the receipt of his property for transportation. That plaintiff could not have understood the contract in the sense claimed for it by the defendants, seems in the highest degree probable, for it can scarcely be credited, that a man of ordinary capacity and intelligence would commit so valuable a package to others to be transported a long distance, without supposing that somebody would be responsible to him for at least good faith, and ordinary care during the transit. But if the construction claimed for the stipulation in question is to prevail, the defendants were neither responsible themselves for ordinary care, after the treasure left their office at Los Angeles, nor bound to take the measures prescribed by the statute to make the owners of the vessels used by them as a means of transportation responsible.

The language of the stipulation under consideration, at least,

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admits of the construction which we have given it; and to hold that the exception includes losses arising from negligence would, in our judgment, be to adopt a strained construction in favor of defendants, and to depart from its obvious import, while as we have seen the rule to be, the construction must be most strictly against the defendants.

Holding, as we do, that the exception in the contract, for the reasons stated does not exempt the defendants from losses resulting from the negligence of those in charge of the steam tug, it becomes unnecessary to determine the more difficult question, in the present state of the authorities, as to the power of common carriers by special contract to exonerate themselves from liabilities arising from the negligence of those employed by them in their business of carriers.

The instructions of the Court, considered in connection with the instrument in evidence, are substantially in accordance with the views here expressed. We therefore find no error in them, or in refusing the instruction asked by defendants.

The damages alleged in the complaint are ten thousand seven hundred and fifty-five dollars, and judgment is asked for that amount only. The verdict and judgment are for eleven thousand seven hundred and forty dollars and eighty-seven cents. This exceeds the amount embraced within the issues. There is no provision in our Practice Act authorizing this Court to allow an amendment to the complaint making it correspond with the verdict. The Court below, before judgment, might have permitted an amendment so as to make the complaint correspond with the verdict, but this was not done. Upon consent of the respondent the judgment may be so modified as to reduce the recovery to the amount claimed in the complaint.

Ordered, that respondent have fifteen days within which to file his consent in writing, that the judgment be modified so as to reduce the amount to the sum of ten thousand seven hundred and fifty-five dollars, and upon filing such consent in writing, the judgment will be modified in pursuance thereof. In default of filing such written consent, it is ordered that

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judgment be entered reversing the judgment of the District Court and granting a new trial.

It is further ordered, that appellants recover their costs of appeal.

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Upon the facts of this case, as detailed in the opinion of the Court delivered by Mr. Justice Sawyer, the Court below instructed the jury, in substance, that if the defendants were an express company, publicly engaged in the transportation of freight from one place to another for hire, they were in law common carriers, and subject to all the responsibilities of common carriers, except so far as they may have lawfully modified them by agreement, and that their responsibilities were wholly unaffected by the fact that they used other vehicles, vessels, or means of conveyance than their own, for the purposes of such transportation. That, as common carriers, the defendants could, by contract, limit the liability imposed upon them by the common law, to a certain extent; but they could not, by such contract, relieve themselves from the exercise of ordinary care in the discharge of their duties; and if the treasure was lost through their negligence, or the negligence of any of their agents, they were responsible for the loss, notwithstanding any contract to the contrary. That if the defendants shipped the treasure on board the *Ada Hancock*, and there was an explosion, occasioned by the negligence of the persons in charge of her, by which it was lost, they were liable, for the reason that by so shipping the treasure, they made, so far as the test of their liability to the plaintiff is concerned, the *Ada Hancock* their vessel, and the persons in charge of her their agents, for the purpose of fulfilling the obligations of their contract with him, notwithstanding they may have had no authority in the management or control of the vessel, or those in charge of her.

The Court below did not undertake to construe the contract in question, or to determine whether by its terms the defendants had stipulated for exemption from liability for any loss

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which might result from the negligence of their agents, or any portion of them; but, assuming such to be the true meaning and intent of the contract, in effect charged the jury that the contract was void upon grounds of public policy so far as it attempted to protect the defendants against the negligence of their agents, whether such agents were in their immediate employment and directly under their supervision and absolute government, or were the parties in charge of the various public conveyances used by them in transporting the treasure in question, and not directly in their employment and in no respect under their control. Such is the theory upon which, as I understand the instructions, this case went to the jury.

The propositions contained in these instructions were duly excepted to by the defendants, and it is alleged that they are erroneous so far as they instruct the jury that the defendants could not, by contract, relieve themselves from liability for losses caused by the negligence of their agents, it being claimed that a common carrier may, by express agreement, circumscribe or limit his common law liability so as to protect himself from the consequences of any act of negligence or wrong committed by any person or persons other than himself, notwithstanding such persons may be his agents, or, in other words, he may by express contract nullify the common law doctrine of *respondeat superior*; and that this was done in the present case by the terms of the receipt which was given by the defendants and accepted by the plaintiff.

It is insisted on the part of the plaintiff that the receipt for the treasure and the annexed conditions given by the defendants, and accepted by the plaintiff, does not establish a contract between them restricting the common law liability of the defendants, because it does not appear to have been signed by the plaintiff, nor does it appear that he either read or was informed of its contents, or that he in any manner assented to its terms further than is implied by his acceptance and silence; and that, therefore, it, in contemplation of law, only amounts to a notice brought home to the plaintiff, to the effect that the defendants would not be responsible except as therein provided.

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It is well settled that, if it is to be regarded as a notice merely, notwithstanding it was brought home to the knowledge of the plaintiff, it did not relieve the defendants from any responsibility imposed by the common law for a loss of the treasure occasioned by their negligence or the negligence of their agents. (*Sayer v. The Portsmouth S. and I. and E. Railroad Co.*, 31 Maine, 228; *Wild v. Pickford*, 8 Mees. and Welb. 443; *Story on Bailments*, 4th edition, § 571.) But the weight of authority seems to be that a receipt delivered and received under like circumstances amounts to a contract. A similar paper was so regarded in *Parsons v. Monteath*, 13 Barb. 353; *Moore v. Evans*, 14 Barb. 524, and in *Holford v. Adams*, 2 Duer, 480; and was expressly so decided in *Dorr v. N. J. Steam Navigation Co.*, 1 Kernan, 485, and in *Wells v. The New York Central R. R. Co.*, 24 N. Y. 183. In the former case, the Court said: "The exception to the common law liability being made in the bill of lading and delivered to the agent of the plaintiff, must be deemed to have been agreed upon by the parties;" and in the latter: "The word 'agreed' means the concurrence of two parties, and the act of acceptance binds the acceptor as fully as his hand and seal would. (Co. Litt. § 217, note; 5 Hill, 258, 259; 1 Seld. 229; 27 Barb. 140, and cases cited.) The point is too well settled to admit of debate."

It is also insisted on the part of the plaintiff that this contract when properly construed does not exempt the defendants from the liability sought to be enforced in this action. The instrument was prepared by the defendants without previous consultation with the plaintiff, who had therefore no choice in the selection of the terms employed. And it is well settled that the language creating the exceptions from liability in such cases must be strictly construed against the party in whose favor they are made. The language was introduced by the defendants for their benefit, and if it is susceptible of a more or less extended meaning the rule of construction in such cases is to adopt that which is the least favorable to the party who is to be benefited thereby. (*Munn v. Baker*, 3 Eng. Com.

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Law, 339; *Airey v. Merrill*, 2 Curtis C. C. 8; *Atwood v. The Reliance Transportation Co.*, 9 Watts, 88; *De Rothschild v. Royal Mail Steam Packet Co.*, 7 Exchequer, Welsby, Hurl. and Gord. 734.)

The language to be construed is as follows: "Received, etc., * * * which we agree to forward * * * and deliver. It is further agreed, *and is a part of the consideration of this contract*, that Wells, Fargo & Co. are not to be responsible, *except as forwarders*, nor for any loss or damage arising from the dangers of railroad, ocean, or river navigation, fire, etc., unless specially insured by them, and so specified in this receipt."

It is insisted by defendants that, notwithstanding they were common carriers and received full compensation for the transportation of the treasure in question, their liability touching such transportation is reduced from that of common carriers to that of forwarding merchants by the foregoing language, or in other words that their liability ceased when the treasure was placed on board the stage coach at Los Angeles, *en route* for San Francisco by coach, steam tug and steamer, the same being the usual mode of public transportation between those places; and that thereafter the treasure was at the risk of the plaintiff until it reached the general agency of the defendants at San Francisco, where their responsibility again attached and continued until a delivery thereof to the address of the plaintiff.

This contract must be read by the light of surrounding circumstances as disclosed by the evidence in the case. The defendants were engaged in the express business; that is to say, in receiving, carrying and delivering, by sea or by land, treasure, goods and packages for hire, in the care of their own messengers, but in vessels, conveyances, steamers, boats and vehicles belonging to other parties, in no way connected or associated with the defendants in their express business, and ordinarily used by the public at large as the common and public mode of transportation and conveyance. In these vessels, etc., the defendants had no interest and no voice in their management, nor

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any authority or control whatever over the persons in charge of them, and were as powerless for the purpose of preventing negligence on their part as the plaintiff himself or any other stranger. But in their capacity as common carriers the defendants were liable for any loss resulting from a defective construction of these public conveyances or a careless and negligent management of them by persons in charge of them. All these facts and circumstances were notorious and well known to plaintiff who had had previous dealings with the defendants in the line of their business. Viewed in the light of these circumstances it is obvious upon a mere glance at the contents of the instrument that it was designed to place a restriction upon the common law liability of the defendants. And I think this has been done in language which every business man would find no difficulty in understanding. They agree to transport the treasure to San Francisco and deliver it to the address of the plaintiff, who, on his part, agrees to pay them the sum of eighty dollars and sixty-five cents, and *in part consideration* relieve them from all liability for any loss or damage for which common carriers are, but mere forwarders of goods are not responsible. A forwarder is one whose business it is to receive and forward goods, by the usual modes of transportation, to their place of destination. He discharges himself from liability by showing that he has used ordinary diligence and prudence in forwarding the goods intrusted to his care by trustworthy and responsible parties engaged in the carrying business. His calling and the legal liabilities thereby imposed upon him are as well known among business men as that of common carriers and the liabilities imposed upon them by the law of the land. I find no difficulty in understanding the terms of this contract, and have no doubt that they were fully understood by the plaintiff at the time he accepted it without a word of dissent.

Having disposed of the preliminary points made by the plaintiff, we now come to the main question involved in this case, and which, so far as I am advised, is presented for the first time in this State. Counsel for the defendants affirm the

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broad proposition that a common carrier may by contract with the shipper protect himself against all liability for losses occasioned by the negligence, fraud, or felony of his agents or servants. That the defendants are common carriers, and that their common law liabilities are wholly unaffected by the fact that they use means of conveyance not belonging to them or under their control or management, are propositions not denied by them. They fully concede that, aside from the contract they would, under the law and the facts of this case, be liable for the loss of the treasure in question; but they insist that they are relieved from that liability by the express terms of the contract of shipment made with the plaintiff. On the part of the plaintiff it is contended that the contract in question is a contract by the defendants against actual negligence and fraud of themselves, their servants and agents, and therefore void upon grounds of public policy. Thus the question as to what extent a common carrier may, by express contract, restrict his common law liability, is clearly and fairly presented by the record. This question has been fully argued upon both sides with much learning and ability, and our task has been rendered comparatively easy by the industry and reasearch of counsel.

That a common carrier may stipulate for exemption from liability for losses not resulting from any fault or negligence on his part, or on the part of his agents, notwithstanding much controversy heretofore, may now be regarded as well settled. By the common law he is absolutely liable for the safety of the goods intrusted to his care; and is responsible for injuries or losses arising from the acts of others, without any neglect or fault on his part, except such as arise from the "acts of God, the public enemies, or the fault of the party complaining." His liability is of two kinds: one is the liability of a paid bailee, and is for losses resulting from neglect on his part, or on the part of his agents; the other is that of an insurer, and is for losses resulting from accident or other unavoidable causes, without any fault on his part or on the part of his agents. Against this latter liability it is now well settled,

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both in England and America, that he may protect himself by contract with the shipper of the goods; for no principle of public policy can be contravened by a contract which merely exempts him from liability for losses which have not been occasioned by any neglect or fault on his part, or on the part of those for whose acts the law holds him responsible. Whether he may go beyond this is a mooted question, for it is claimed by the defendants that there are cases both in England and America which seem to sustain, to its full extent, the doctrine for which they contend.

Austin and another v. The Manchester, Sheffield, and Lincolnshire Railway Company, 70 Eng. Com. Law R. 453, was an action to recover damages for the loss of a horse which was killed while being conveyed on defendants' railway. The horse was delivered to the railway company to be carried by them for hire subject to a note or ticket in the following words: "This ticket is issued subject to the owner's undertaking to bear all the risk of injury by conveyance and other contingencies; and the owner is required to see to the efficiency of the carriage before he allows his horses or live stock to be placed therein; the charge being for the use of the railway, carriage and locomotive power only, the company will not be responsible for any alleged defects in their carriages or trucks, unless complaint be made at the time of booking, or before the same leave the station; nor for any damages, however caused, to horses, cattle, or live stock of any description, travelling upon their railway or upon their vehicles." And it was held that, giving to the words of the contract their most limited meaning, they must apply to all risks, of whatever kind and however arising, to be encountered in the course of the journey; and that, therefore, the company were not responsible for the loss of the horse which was occasioned by the firing of a wheel in consequence of the neglect of the servants of the company to grease it.

Carr v. The Lancashire and Yorkshire Railway Company, 14 Eng. Law and Equity, 340, was a like case and founded upon a like contract, and it was held that, under the terms of

the contract, the railway company were not responsible. In both of these cases the loss was occasioned by the gross negligence of the defendants, but it is to be observed that they were made to turn entirely upon the construction of the contracts upon which they were founded, and upon the assumption that the contracts were legal under the provisions of the Carriers' Act authorizing special contracts to be made; and it seems to have been admitted that railway companies had a right to protect themselves in such cases, doubtless, upon the principle that they were under no public obligation to transport cattle and live stock. In the case last cited, Parke, B., said: "Prior to the establishment of railways, the Courts were in the habit of construing contracts between individuals and carriers much to the disadvantage of the latter. Before railways were in use, the articles conveyed were of a different description from what they are now. Sheep and other live animals are now carried upon railways, and horses which were used to draw vehicles are now themselves the objects of conveyance. Contracts, therefore, are now made with reference to the new state of things, and it is very reasonable that carriers should be allowed to make agreements for the purpose of protecting themselves against the new risks to which they are in modern times exposed. Horses are not conveyed on railways without much risk and danger; the rapid motion, the noise of the engine, and various other matters, are apt to alarm them and to cause them to do injury to themselves. It is, therefore, very reasonable that carriers should protect themselves against loss by making special contracts."

Thus there are marked differences between those cases and the present, and the precise ground upon which this case rests was not considered or regarded as being involved, and hence the theory of the defendants finds in them but little, if any, support. But there are several late cases decided by the Court of Appeals, of the State of New York, which seem to go a great way in sustaining the doctrine for which the defendants contend.

Wells v. The New York Central Railroad Company, 24 N.

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Y. 181, was an action to recover damages for injuries sustained by the plaintiff while a passenger upon defendants' road from a collision between the train in which he was riding and a freight train carelessly left on the track in the night time. The plaintiff paid no fare, but was carried under a free ticket, on which were printed the following words: "The person accepting this free ticket assumes all the risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using this ticket;" and it was held that such contract was not against law or public policy and was valid. That Court is composed of eight Judges—a bare majority concurred in the judgment, two dissented and one was absent. Mr. Justice Sutherland delivered the dissenting opinion in which he held that the contract exempting the defendants from liability for the negligence of themselves and agents was null and void as being against public policy. The leading opinion is very brief and unsatisfactory, while the other is able and conclusive upon the question as it was presented by the facts of that case.

This case was followed by *Perkins v. the same company*, (24 N. Y. 196) where it was held that a railroad corporation could not by contract exempt itself from liability to a passenger for damages resulting from its own wilful misconduct, but might, in respect to a gratuitous passenger, by contract exempt itself from liability for any degree of negligence in its servants, other than the board of directors or managers who directly represent the corporation. Here a distinction was made between passengers who pay and those who do not, and between immediate and remote agents.

Smith, Administrator of Joseph Ward, deceased v. the same company, 24 N. Y. 222, was an action under the statute for damages resulting from the negligent killing of the plaintiff's intestate while a passenger on the defendants' railroad. The deceased made a written contract for the transportation of two car loads of hogs. The contract recited that they were carried

at a reduced rate in consideration of the owner's assuming certain specified risks in respect to the safety of the hogs. It also contained this clause: "It is further agreed that the said Ward is to load, transship, and unload said stock at his own risk; the said New York Central Railroad Company furnishing the necessary laborers to assist. And it is further agreed that the persons riding free to take charge of the stock do so at their own risk of personal injury from whatever cause." Ward went upon the train in charge of his hogs. At Rochester the car in which Ward and other drovers had previously ridden was taken from the train, and an old emigrant car, unsafe by reason of a flattened wheel, was substituted. This car was thrown off the track, and Ward was killed. The plaintiff had a verdict. The judgment was affirmed by a majority of the Court, five being for affirmance and three for reversal. But the majority differ as to the grounds of affirmance. Mr. Justice Wright and Mr. Justice Sutherland held the contract void, the latter doing so irrespective of the question whether the transportation was gratuitous or for hire. Mr. Justice Smith was for affirmance on the ground that the negligence was that of the corporation itself, and not its agents. Mr. Justice Denio and Mr. Justice Davis were of the opinion that there is no general public policy forbidding a contract by which a railroad corporation may exempt itself from liability for the negligence of its agents in respect to a purely gratuitous passenger, but such contract was prohibited by the Railroad Act and its policy in the case of a paying passenger, and were for affirmance on the ground that the plaintiff's intestate was not a gratuitous passenger. So the case establishes no principle, and decides nothing except itself.

Bissell v. the same company, 25 N. Y. 442, was an action precisely like the last. The plaintiff had judgment, which was reversed on appeal, five Judges being for reversal and three for affirmance.

The most that can be said for these cases is that they establish the doctrine in New York that a railroad corporation may, by express contract, exempt itself from all liability for the

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negligence or misconduct of its subordinate servants and agents, leaving, however, undetermined the question whether there are not certain agents so directly and immediately connected with the corporation that a contract relieving it from liability for their negligence would be illegal, (see opinion of Mr. Justice Selden in case last cited, p. 446,) which it must be confessed is not a very clear or satisfactory condition in which to leave so important a principle, and it admits of serious doubt whether, after all the discussion had in those cases, there is any common ground upon which a majority of the Court stand. Regarding them, however, as establishing the doctrine that a common carrier may contract against the negligence of his immediate agents, I think them opposed to principle and the weight of authority in America, and am not disposed to follow them. On the contrary, in my judgment, a contract exempting a common carrier from liability for losses to property, or injuries to persons resulting from the negligence of their agents, is null and void upon grounds of public policy, irrespective of the question whether the transportation be gratuitous or for hire. (See authorities cited in respondent's brief.) But in applying this principle a distinction is to be made between agents, as whether they are immediate or remote. By the former I mean such as are directly employed by the party sought to be charged, in his business exclusively, and are of his own selection, paid by him and in all respects subject to his will. By the latter I mean such as are made his agents (if I may be allowed the expression), not by contract directly between him and them, but by operation of law merely; or, in other words, persons not directly selected and employed by him and not in any respect under his control, but who nevertheless are in law considered as his agents, and for whose acts he is held responsible, notwithstanding they are in fact selected, employed and paid by and owe obedience to other parties who have no concern in his business and are in no just sense subordinate to him. Against the negligence of this latter class the common carrier may, in my judgment, protect himself by contract without violating any

principle of public policy, but as against the negligence of the former he cannot. As to the former the carrier occupies the position of a principal in fact as well as law, and the true reason upon which the doctrine of *respondet superior* is founded exists; but his relation to the latter is not strictly that of a principal, and the maxim, *Qui facit per aliam facit per se*, does not apply in any just sense. On the contrary, as to their acts he occupies a position *analogous to that of an insurer only*, and there is therefore no rule of public policy which precludes him from protecting himself by express contract against the risk of their acts. It cannot be claimed with any show of reason that negligence on the part of persons in charge of public conveyances, such as railroad trains, steamers and stage coaches, is induced by a contract between two strangers to the effect that one will and the other will not take upon himself the risk of their conduct in respect to the transportation of a particular shipment of goods. The transaction is too remote and can possibly have no bearing or effect upon the conduct of the parties in question. To say that the persons in charge of the Ada Hancock were less careful in the performance of their duty by reason of the contract between the plaintiff and defendants, of which they knew nothing, is to assert a proposition which is contrary to reason. Had the treasure been lost through the negligence of Ritchie, the defendants' messenger and immediate agent, or any other agent directly employed by them in their express business, the defendants would have been liable notwithstanding any contract to the contrary, upon grounds of public policy. But the defendants may lawfully contract (as I understand them to have done, in effect, in the present case) for indemnity against losses resulting from defects in the public conveyances used by them in the prosecution of their business, and against the negligence of the persons having such conveyances in charge, without violating any principle of public policy. Such losses are not the result of their fault or neglect within the true intent and meaning of the rule invoked by the plaintiff. The business in which the defendants are engaged, and the

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mode in which it is transacted, are of comparatively modern growth, and had no existence at the time when the rule in question became a part of the common law; and the new conditions presented by their use of remote, or, so to speak, foreign agencies in the transaction of their business, do not in my judgment fall within either the letter or spirit of that rule. The question is simply as to which of the contracting parties shall assume the risk of loss which may or may not result from the negligence of other parties over whom neither has any authority or control. In its determination the public can have no possible concern, for whichever way it may be decided the decision can have in the nature of things no effect whatever either by way of inducing or preventing the negligence in question. Nor is there any force in the suggestion that by holding such contracts valid the shipper will be placed at the mercy of the carrier. He is not bound to make the contract. On the contrary, he may insist that the carrier shall receive his goods upon the terms and conditions imposed by the law of the land, and the carrier cannot refuse to take them without subjecting himself to an action. Having engaged in a business, in its nature of a public character, he is bound to accommodate the public, and to receive and transport all goods coming within the line of his business, under all the responsibilities imposed by the law, upon the payment of a reasonable compensation.

It is urged, by way of argument on the part of the plaintiff, that, unless the defendants are held liable, the plaintiff will be without remedy, for the reason that the owners of the *Ada Hancock*, under the peculiar circumstances of this case, cannot be made responsible. This point rests upon the fact that the defendants did not give the master, agent or owners of the *Ada Hancock* a note in writing of the true character and value of the treasure in question, pursuant to the provisions of an Act of Congress of the 3d of March, 1851, entitled "An act to limit the liability of shipowners, and for other purposes." (United States Statutes at Large, 635.) That Act, by its own terms (Section 7), does "not apply to the owner or owners

of any canal boat, barge or lighter, or to any vessel of any description whatever, used in rivers or inland navigation." It would seem that the *Ada Hancock* comes within the description of vessels excepted from the operation of the Act. She plies only between the shore and the anchorage of the steamer *Senator*, a distance of only three miles. Such can hardly be deemed ocean navigation. That term can only be applied to the voyage performed by the *Senator*. The ocean voyage commences and ends at the anchorage of the vessels by which it is performed. The office performed by the *Ada Hancock* was that of a lighter. She was used solely for the purpose of carrying passengers and light freight from the shore to the steamer *Senator*, and was, therefore, no more engaged in ocean navigation than the other small boats or vessels called lighters, in the record in this case, by which the heavier freight was usually transported. The latter are within the exact letter of the exception in question, and the *Ada Hancock*, in view of the purpose for which she was employed, can hardly be said to be without it merely because she is called a steam tug instead of a lighter. I am, therefore, of the opinion that the Act in question has no application to the facts of the present case; but were it otherwise, it is by no means clear that the defendants were guilty of negligence in not complying with its provisions in order to charge the owners of the *Ada Hancock*. The Act was intended solely for the benefit and protection of shipowners, and I see no reason why they may not waive its observance on the part of shippers, if so disposed. There are facts in this case which tend to show that such may have been the case in the present instance.

My conclusion is that the case was not tried in the Court below upon the proper theory, and that the judgment ought to be reversed and the case remanded.

Statement of Facts.

A. S. HURLBUTT v. PETER BUTENOP.

CERTIFIED COPY OF A DEED AS EVIDENCE.—A party claiming title under a deed duly acknowledged is entitled to have a certified copy of the record of the same received in evidence, upon making statute proof that he never had control of the original, and that it is not then in his power or control.

RECORD OF DEED NOT PROPERLY ACKNOWLEDGED.—The record of a deed not properly acknowledged does not give constructive notice to subsequent purchasers in good faith.

DECREE IN ACTION BROUGHT BY ONE FOR HIMSELF AND ON BEHALF OF OTHERS.

—Where an action is brought by one of several persons, claiming title from a common source, on his own behalf and in behalf of all others interested in the same manner as himself, to set aside a deed executed to others by the same grantor under whom plaintiff claims, on the ground of fraud, the parties named in the complaint, for whose benefit the action is brought, are entitled to the benefit of the decree declaring the deed fraudulent.

PURCHASERS AFTER *lis pendens* FILED.—If a *lis pendens* is filed at the commencement of an action brought to set aside a deed on the ground of fraud, parties who buy of the defendant pending the litigation are bound by the decree.

ASSESSMENT MUST FIX VALUATION ON PROPERTY.—An assessment of town lots for taxation, which does not give their cash valuation either in gross or detail, is radically defective. Figures placed opposite town lots in an assessment roll, without any statement whether they stand for cents, dollars, or eagles, do not fix any valuation to the same.

TAX DEED—WHEN VOID.—A tax deed executed in 1860, for land sold for taxes, is void if the assessment shows that there was not any cash valuation of the lot which the deed purports to convey.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

In the suit brought by Edward Gibbons, on behalf of himself and others, the complaint set forth the execution of the deed of Vincente Peralta to Hays, Caperton *et als.*, dated 13th day of March, A. D. 1852, and that he, Gibbons, had become a purchaser under the said deed of a certain tract of land in the City of Oakland; that a large number of persons, several hundred, had likewise become purchasers under the said deed, and for valuable considerations; that the parties similarly situated with himself were numerous, and that it was impracticable to bring them all before the Court.

The plaintiff recovered judgment in the Court below, and defendant appealed.

The other facts are stated in the opinion of the Court.

Argument for Appellant.

George & Loughborough, for Appellant.

The plaintiff sought to introduce copy of deed under the authority of the second section of the Act of 1857. It was, therefore, upon the plaintiff to *show* — not merely *swear* — that the original deed was not under his control, or that it was lost, before he should be permitted to use the certified copy. This, we contend, he failed to do. He *swore*, it is true, *in the words of the statute*, that he had not control of the original. His language was: "*I never had control of the original deed, and it is not now in my power or control.*"

This was only swearing to a *conclusion* of law, but does not *show to the Court* that the original was not under his control.

"It is an established rule that the best evidence must in all cases be given of which the nature of the fact to be established or negatived is capable. This is a rule of policy grounded upon a reasonable suspicion that the substitution of inferior for better evidence arises from some sinister motive, and an apprehension that the best evidence, if produced, would alter the case to the prejudice of the party." (Petersdorff's Com. Law, Tit. Evidence; *Bagley v. McMickle*, 9 Cal. 445.)

"The rule which excludes substitutionary evidence so long as the best evidence can be had, was made for the prevention of fraud, and has become essential to the pure administration of justice." (1 Green. Evidence, Sec. 82.)

"And the rule being general in its application, it *would not be sufficient to rebut this presumption in any particular case*, so as to let in the substitutionary evidence. Thus it would be of no avail to prove that the *copy* tendered in evidence was in every respect quite correct; it would be still inadmissible while it was in the *power* of the party to produce the *original*." (1 Phil. on Ev., 4th Am. Ed., 570.)

"The Act of 1851, which provided that copies of papers from the Recorder's office shall be received in evidence with the like effect as the original could be if produced, did not dispense with the production of the original if it could be *obtained*." (*Macy v. Goodwin*, 6 Cal. 582.)

Argument for Respondent.

Before a certified copy can be offered in evidence, the party *must prove the loss of, or his inability to produce the original.* Per Judge Field, in *Touchard v. Keyes*, 21 Cal. 211.

As to the sufficiency of the proof that a deed is lost, see *Fallon v. Dougherty*, 12 Cal. 105, and the cases there cited.

As to what proof, or rather what facts are sufficient to show the inability of the party to produce the original, see numerous cases cited in Note 446 to 2 Phil. Ev., Edwards' Ed., p. 514; see also p. 552.

The tax deed of the defendant shows upon its face that all the requirements of the law were fully complied with, and is therefore *prima facie* evidence of all the matters set forth by it and of title in the grantee. (*O'Grady v. Barnhisel*, 23 Cal. 287.)

If the plaintiff was the owner of the land, it was his duty to pay the taxes. He could not have been misled by any act of the defendant, for the land was assessed to P. C. Lander, who conveyed to the plaintiff after the lien had attached and before the taxes became payable.

The defendant was under no obligation to the plaintiff to pay these taxes, nor can he be required to hold the tax title in trust for the plaintiff, for there was no privity in estate nor fiduciary relation existing between them.

The defendant was under no obligation to the State to pay the taxes unless the land was his, or at least assessed to him as the owner.

Samuel J. Clarke, Jr., for Respondent.

The proof was stronger than that required by the statute. The plaintiff testified that he never had control of the original deed, and in the very words of the statute, "it is not now in my power or control." The plaintiff's counsel argues that this was only swearing to a conclusion of law. Whether he swore to a conclusion of law or not, makes very little difference; he swore to what the law required he should swear to.

But we differ from the counsel as to *what is a conclusion of*

Argument for Respondent.

law. When a party swears that he has not the control of a deed, we understand that he swears to a fact. The counsel also contends that the evidence did not show that the original was not under the control of the plaintiff. On this point we might cite one of the authorities referred to by the defendant himself — the case of *Bagley v. McMickle*, 9 Cal. 449. Judge Field there says “the preliminary proof is addressed to the Court, and as to its sufficiency the Court is the sole judge.”

The only proof upon the question was the evidence we have cited. *No evidence* was produced on the other side; and the Court below, acting upon the only proof before them, admitted the certified copy in evidence.

The owner is not bound to select from a long list of property any particular lot, and make a calculation of the amount of tax supposed to be charged thereon; *that is a duty* imposed upon the *officers* of the law. That was the information that the assessment roll should convey to the owner.

Upon this point we refer to Blackwell on Tax Titles, page 176: “When one owns several tracts or parcels of land, they should be listed and valued separately, else the proceeding will be void. Thus, in *Skimin v. Hinman*, the statute required the Assessors to set forth in these lots the number of acres of unimproved lands which they may have taxed on each non-resident proprietor, and the value at which they may have estimated the same.”

It appears from the statement in Blackwell, that three lots were charged to William Chemin: the aggregate value was put down at two hundred and forty dollars; the State and county tax at sixty-one cents; the number of acres; the town tax, three dollars and twenty-two cents, and the total tax, three dollars and eighty-three cents. The Court held the list illegal, saying a fair construction of the statute requires that each lot should be valued and assessed separately.

The lots may be owned by different persons, and if a joint valuation and assessment was allowed, one owner could not ascertain the amount of the tax on his own land, or pay or redeem the land when sold, without paying the tax upon all

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the other land assessed with it, although in this case the several lots appear to have been owned by *one person*. That fact cannot dispense with the law, or excuse a deviation from it. (26 Maine, 228.) Blackwell then proceeds to cite the case of *Willey v. Scovill's Lessee*, 9 Ohio, 43. It appears from that case that there were *nine lots* assessed together. Mr. Justice Grinke says: "The law requires that the Auditor should so list and advertise the land as to furnish the owner with a description of the land subject to taxation, and that the sale shall be advertised and conducted in conformity with that rule." In this instance there was no assessment in gross upon the whole amount of the taxes chargeable upon the nine lots, and yet each lot was put up to pay the tax on it separately.

"The land is not treated as an entire part in the list advertisement for sale, but is so treated in the apportionment of the tax. Now, it is evident that the course pursued should be consistent with itself; if the lots might be treated as separate and distinct parcels of land, then the tax charged upon them should have corresponded with the fact in the description; and if they should be treated as one entire tract, then, although the assessment of the tax in the advertisement in one aggregate sum would have been correct, the description of the land itself would have been erroneous, and so would the sale under it. In either case the title would be defective, and the Court was right in ruling out the evidence."

By the Court, SHAFER, J.

This is an action of ejectment brought to recover the possession of Block Sixty-seven, situated in the City of Oakland, and is parcel of lands granted by the Mexican Government to Peralta. Both parties claim under the said grantee. The plaintiff, at the trial, offered in evidence, as part of his deraignment from Peralta, a certified copy of the record of a deed from Irving to one Marshal. The plaintiff was sworn and testified that he "never had control of the original deed, and that it was not then in his power or control." The defendant

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objected to the admission of the document, on the ground that there was not sufficient evidence of the loss of the original, and that no diligence had been used to produce it. The objection was overruled by the Court, and the defendant excepted.

This ruling was correct. (*Skinker v. Flohr*, 13 Cal. 638.)

The plaintiff, having connected himself with J. C. Hays and others, grantees of Peralta, by deed dated March 13, 1852, and recorded March 17, 1852, on a defective acknowledgment, and having further proved that Peralta was in possession of the property in 1849, and the defendant was in possession at the commencement of the action, July 30, 1860, rested his case. The defendant then gave in evidence a deed of the premises from Peralta to Francisco Galindo, dated October 8, 1857, and recorded on that day, and a deed from Galindo to defendant, dated July 27, 1860, duly recorded. The defendant also introduced a tax deed to himself, dated July 27, 1860, recorded June 20, 1861. The plaintiff, in rebuttal, produced the tax certificate showing that the sale was to Henry Butenop and not to defendant, and also gave in evidence a deed from Galindo to Pacheco, dated September 24, 1858, and recorded on that day; and also the judgment roll in an action brought by Edward Gibbons against Peralta and wife, Galindo, and Pacheco, on the 2d of February, 1859, in which action it was adjudged that the aforesaid deed from Peralta to Galindo, and the deed from Galindo to Pacheco, were fraudulent and void as to the plaintiff Gibbons, "and those on whose behalf he sues." It appears by the record that Gibbons sued on his own behalf and on behalf of all others claiming, as he claimed, under the deed of Peralta to Hays and others, of March 13, 1852. A notice of *lis pendens* was filed in the action, and, as we understand the record, on the day the action was brought.

The Court instructed the jury that the plaintiff had proved title in himself—that the defendant had failed to make out a defense, and that the plaintiff was entitled to a verdict—to which charge the defendant excepted.

1. Laying the decree in *Gibbons v. Peralta* out of account,

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the case stands thus: The plaintiff proved title in himself through the unrecorded deed of Peralta to Hays and others, of March 13, 1852. The defendant then proved a title apparently better than that, through the recorded deed of Peralta to Galindo, of October 8, 1857. The plaintiff, however, for the purpose of showing that the defendant took nothing by Galindo's deed of July 27, 1860, proved that Galindo had no title at that date by showing a previous conveyance by him to Pacheco. Assuming that the evidence accomplished its purpose, yet standing by itself it demonstrated also that the plaintiff himself had no title, the deed of Peralta to Hays not having been duly recorded. There was evidence in the case tending to prove that Peralta was in possession in 1849, but none tending to prove any entry on the part of the plaintiff. But the case did not go to the jury on the state of facts suggested. The decree in the case of *Gibbons v. Peralta and others*, established that the deed from Peralta to Galindo, and the deed from Galindo to Pacheco, were nullities as to Gibbons and all others claiming under Peralta through his deed to Hays and others. The plaintiff herein is one of the unnamed parties for whose benefit that suit was brought, and as such is entitled to participate in the benefit of the decree. The defendant is bound by the decree, for there was a notice of *lis pendens* filed, and the defendant bought of Galindo pending the litigation. It is further to be observed, that the defendant neither proved nor offered to prove that Galindo was a *bona fide* purchaser under Peralta for a valuable consideration.

2. It is further insisted that the instruction was erroneous, for the reason that the defendant became the owner of the lands by force of the tax deeds.

The tax was assessed under the Act of 1857 and other Acts amendatory thereof and supplementary thereto. The assessment roll was put in evidence, from which it appeared that the block in question (No. 67, situated in Oakland township) was listed to P. C. Lander. The question discussed by counsel as to whether the defendant could purchase the property at tax sale, he having been in possession at the time the tax

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was assessed, does not arise, for the reason that the record shows that the property was purchased by Henry Butenop, and there is no evidence in the case showing that the purchase was in trust for the defendant or by any collusion with him. It appears by the recitals in the deed that the certificate of sale issued to the purchaser was assigned by him to the defendant, and we shall assume, for all the purposes of this hearing, that the fact is established by force of the recitals. We consider that the assessment is radically defective in a number of particulars. There are seven distinct lots assessed to Lander, described severally by numbers, but their value is given neither in gross nor in detail. Under the head of "value of city and town lots," there are figures written off against the numbers of the lots respectively, and in case of Block Sixty-seven, the figures "500;" but whether they stand for cents or dollars or eagles does not appear.

It is to be further observed, in relation to the first three blocks, that they are flanked on the right, in the assessment roll, by a single sum, "14 50." The "total value of the property" is not represented otherwise than by the barren figures "21.05," which sum, if read as a whole number, is larger than the sum of the figures first referred to by fifty, and the "total tax" is set down as 32.63 cents. Passing by these obvious discrepancies, however, it is sufficient to say that the tax deed is void for the reason that it appears there was never any cash valuation of the lot which the deed purports to convey. (Acts 1857, p. 327, Sec. 4; Black. Tax Tit., 176, 193; *Huse v. Merriam*, 2 Greenleaf, 375.)

Judgment affirmed.

WILLIAM K. REED v. THOMAS SPICER AND DANIEL SPICER.

DESCRIPTION OF LAND IN A DEED.—If a deed recites two descriptions of the property conveyed, one of which sufficiently identifies the property, while the other is false in fact, the false description should be rejected as surplusage.

Argument for Appellants.

DEED OF A DITCH.—A deed conveying a right of way upon land, in, to, and for a ditch called the Mountain Brow Ditch, is a conveyance of the ditch itself.

A DITCH NOT AN EASEMENT.—A ditch used for the conveyance of water for mining purposes is not a mere easement or incorporeal hereditament.

SALE BY TENANTS IN COMMON.—If two persons own a tract of land as tenants in common, and one of them conveys to a third person a ditch crossing the same, and the other afterwards conveys to another third person the same ditch, the deeds are valid conveyances as between the parties, and the persons to whom the conveyances are made become tenants in common in the property.

STATUTE OF LIMITATIONS — MEXICAN GRANT.—The Statute of Limitations does not commence to run, with regard to lands held under a Mexican or Spanish grant, until a patent for the same has been issued by the Government of the United States.

APPEAL from the District Court, Thirteenth Judicial District, Stanislaus County.

The facts are stated in the opinion of the Court.

Coffroth, and *Spaulding*, for Appellants.

The first ground of objection was "that said deed did not convey any interest in the land in question, nor any easement therein, but merely an interest or easement in certain lands belonging to defendant Spicer."

It is true that in the description of the thing granted, the words occur: "All the right of way in and upon the land owned by the said party of the second part." This may have been a verbal error, or it may have been a mistake of the parties as to their legal rights. In either case it is immaterial.

The palpable mistake of a word will not defeat the manifest intention of the parties. (Dougl. 384.)

The property is described in the deed by a certain name. This is sufficient. (*Castro v. Gill*, 5 Cal. 42; *Stanley v. Green*, 12 Cal. 166.)

There can be no mistake as to the intention of the parties to this deed.

In the *habendum* of the deed Haley conveys to Spicer "all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above described

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premises, and every part and parcel thereof, with the appurtenances."

The office of the *habendum* is properly to determine what estate or interest is granted by the deed. (2 Black. Com. 298.)

In this case all the interest of the grantor passed. The mistake or ignorance of any of the parties to a conveyance of their rights in the estate will not render the deed void. (Sugden on Vendors, Vol. II, p. 514; *Storrs v. Baker*, 6 John. Ch. 166.)

The Court erred in excluding the oral testimony offered by defendants, to wit: "That the defendants, and those from whom they deraign title, had constructed said ditch in 1856, and had ever since held the same adversely to the plaintiff and his grantors."

The objection to this evidence was, "that the patent had only issued in 1863, and from that time alone did the Statute of Limitations begin to run."

The plaintiff in this case seems to have proceeded upon the theory that fee simple titles to real estate and easements are governed by the same laws, or, at least, that the Statute of Limitations applies in the same manner to one as to the other. The law of easements, as applied to running waters, (the *aquæ ductus* of the civil law,) must govern and control the case at bar.

All easements are things incorporeal, mere rights, invisible and intangible. (*Bowen v. Team*, 6 Rich. 298; *Kowbotham v. Wilson*, 8 Ellis & B. 123; Wash. on Easements, 18.)

The grant by which an easement is created may be evidenced in several ways. It may always be done by the production of an existing deed. So it may be by prescription or long enjoyment of the easement claimed.

So the law often regards the *enjoyment* of an easement as evidence that a deed once existed, and gives to this presumption the same effect in establishing a title as if the deed were produced. This mode of treating the enjoyment of an easement, as evidence of a title to the same by deed, has taken the

Argument for Respondent.

place in modern practice of the ancient doctrine of prescription. (Wash. on Easements, 19.)

In such cases, in the language of Lord Mansfield, "not that the Court really thinks a grant has been made, but they presume the fact for the purposes, and from the principle of quieting the possession." (*Eldridge v. Knott*, Cowp. 214.)

H. P. Barber, for Respondent.

Whether the property was conveyed to plaintiff by tenants in common or not, makes no difference, as one tenant in common is entitled to hold the *entire* property against all the world, except his co-tenant; and unless the defendant, Spicer, can show himself a co-tenant, he has no defense. (*Touchard v. Crow*, 20 Cal. 150.)

The deed conveys no interest whatever to Spicer in any property owned by Haley. Appellant *assumes* this was a mistake. Suppose Haley had held a lease from Spicer of this land, and gave him the deed to enable him to construct a ditch over the land so leased, would there have been any mistake in this deed?

It will be remembered defendant merely offered the *deed* in evidence — no offer whatever was made to show that there was *any* mistake in it. The deed itself evidently conveyed no right of way over any lands owned by Haley, and the Court was right in rejecting it. Errors and mistakes in deeds must be corrected in equity. They cannot be corrected, collaterally, in a Court of law. (*Cameron v. Irwin*, 5 Hill, 272; *Leavitt v. Palmer*, 3 N. Y., 3 Comst., 19; *Adams' Equity*, 4 Am. ed. 382, 387.)

Defendant's *entire* title to the right of way, claimed by him, is founded on this deed from Haley. Even were the deed valid on its face, it would be ineffective; for one tenant in common does not possess the power to create an easement on the joint property. At the time of the alleged deed from Haley, Stebbins and Haley were tenants in common of the land over which this pretended right of way was granted by

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Haley, and his *sole* grant was void. The reason of the rule is obvious. If either tenant in common possessed power to grant a right of way over or create an easement on the common property, he might totally ruin it, as by granting the right to dig a canal or construct a road through it. The principle is expressly laid down in Washburn on Easements, 29; 3 Kent's Com. 578, note *a*.

By the Court, SHAFER, J.

This is an action of ejectment brought to recover the possession of certain premises described as "The Mountain Brow Water Company's Ditch—consisting of dams, ditches, flumes and reservoirs used for mining and irrigating purposes, lying and being situate in the Counties of Calaveras and Stanislaus." Trial by jury—verdict and judgment for plaintiff. The appeal is from the judgment and from the order overruling defendant's motion for a new trial.

It appears from the record that the ditch in question crosses certain two leagues of land which, on the 25th of January, 1860, were owned by Salsbury & Haley and James Phelan, as tenants in common—and certain other lands belonging to one Packard, adjoining the lands first mentioned, on the west. On the aforesaid date Packard conveyed to the plaintiff that part of the ditch which crossed his own land, and ten feet additional on each side of it; and on the 26th of June, 1862, Phelan executed to the plaintiff a deed purporting to convey that section of the ditch which crossed the two leagues owned by the grantor in common with Haley, with a like selvedge of ten feet on either side. The plaintiff having proven these facts, and shown the defendants in possession, rested his case.

The defendants, in support of the issue on their part, offered in evidence a deed executed by said Haley to Thomas Spicer, one of the defendants, January 25th, 1860. The evidence was objected to, first, on the ground that the deed did not convey, nor purport to convey, any interest in the land in question, but merely an interest or easement in certain lands belonging

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to Spicer, the grantee; and, second, on the ground that Haley, being merely a tenant in common of the land, could not grant an easement therein. The objections were sustained, and the defendants excepted. The defendants then offered to prove by Spicer that the ditch was constructed in 1856, and that it was constructed by the defendants and those from whom they derived title, and that they had ever since held the ditch adversely to the plaintiff and his grantors. It being already in proof as a part of the plaintiff's case, that he held under a Mexican grant confirmed under the Act of Congress, and that the patent founded thereon did not issue until 1863, the Court excluded the evidence, on objection of the plaintiff, and the defendants excepted. These rulings of the Court we are now called upon to review.

1. As to the exclusion of the deed from Haley to defendant Spicer.

By the deed, Haley, the party of the first part, "for and in consideration of one dollar to him in hand paid by the party of the second part (Spicer) remised, released and quitclaimed unto the said party of the second part, and to his heirs and assigns forever, all the right of way in and upon the land owned by the said party of the second part, in, to and for the ditch called 'Mountain Brow Water Company,' together with the privilege of building a dam across Little John's Creek, for the purpose of a reservoir for said ditch. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining. And also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises, and every part or parcel thereof, with the appurtenances. To have and to hold," etc.

The interest intended to be conveyed is, literally, a "right of way." There are two independent descriptions of the way; first, by name—"a way to, in and for the ditch called Mountain Brow Water Company;" second, by indicating the land which the way crosses, viz: "land owned by Spicer."

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It is clearly shown by the record, and counsel on both sides admit, the second description to be false. If false, the description should be rejected. (Broom's Maxims, 490.) In the case of a lease of a portion of a park, described as being in the occupation of S., and lying within certain specified abutments, with all the houses, etc., belonging thereto, "which are now in the occupation of S.," it was held that a house within the abutments but not in the occupation of S. would pass. (*Doe d. & Smith v. Galloway*, 5 B. and Ad. 43; *Beaumont v. Field*, 1 B. & Ald. 247.) The ditch is spoken of in the deed as a ditch then existing. Its *termini* and branches are set forth in the complaint, and the disseisin alleged comprehends the whole of the ditch, branches included. Stakes, the surveyor, called by the plaintiff, testified that "the property described in the complaint was located in part on the two leagues owned by Phelan and Haley, and in part upon the three and a half leagues to the west, owned by Packard;" and this was the only testimony upon the subject. Nor was there any evidence in the case showing that there was any ditch in the Counties of Calaveras and Stanislaus known as the "Mountain Brow Ditch Company," other than the one crossing the lands above mentioned. The deed then does not present the case of two descriptive phrases, one of which by restraining or narrowing the larger scope of the other, makes it more specific — both amounting to but one description in legal effect; but instead thereof, the deed, when read in the light of the *res gestæ*, presents the case of two descriptions, independent and detached, one of which goes upon a matter of fact which the proof of the plaintiff shows had no existence at the time when the deed was executed.

As to the second objection to the admissibility of the deed, it was not in our judgment well taken. Substantially the conveyance was of the ditch, for there can be no distinction taken between a "right of way in a ditch" or "for" an existing ditch, and the ditch itself. The argument of the respondent proves too much; for if a mining ditch is to be regarded as a mere easement, or incorporeal hereditament, it would fol-

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low that this action could not be maintained. But passing this, we do not consider it necessary to inquire as to the effect of a deed executed by one tenant in common of all his interest in a given part of the common property, or of some estate therein of a quality inferior to his own. That question does not arise on this record. Assuming the fact which the rejected deed would have established had it been admitted, Haley, one of the tenants in common of the ditch, conveyed all his interest in it to defendant Spicer in 1860, and Phelan conveyed all his interest in it to the plaintiff in 1862. The parties to this suit then are tenants in common of that portion of the ditch crossing the two leagues, if the validity of both deeds be assumed; but if the deed under which the defendants claim from one of the tenants in common be held as invalid for the reason that the co-tenant was not a party to it, then the deed under which the plaintiff claims must be void by parity of reasoning, and the plaintiff is out of Court. But the deed of Haley to Spicer is good as between the parties to it, and so as to the deed from Phelan to the plaintiff. Phelan might have avoided the deed of his co-tenant to Spicer, (1 Hill. R. P. 585,) and so could the plaintiff if he had succeeded fully to Phelan's rights. But he has not. Phelan and Haley are still tenants in common of the two leagues, less the ditch. Haley has conveyed his interest in the ditch to Spicer, and Phelan has conveyed his interest in it to the plaintiff. The respective grantors have co-operated in withdrawing the ditch from the operation of the common title, and as between the two neither can now be considered as having conveyed against the will of the other. The conveyance by Phelan was all that was wanting to make Spicer's title perfect, and the prior conveyance by Haley to Spicer was the very fact which put it in the power of Phelan to make a perfect title to the plaintiff. As neither of the grantors can now question the action of the other, their respective grantees cannot do it. As between themselves, they are what the several but co-operative deeds of Phelan and Haley have made them, viz: tenants in common of the ditch and its branches. (*Stark v. Barrett*, 15 Cal. 368; 1

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Wash. on R. Prop. 417.) Therefore the deed of Haley to Spicer should have been admitted.

The evidence of the defendants offered in support of the plea of the Statute of Limitations was properly excluded, for the statute began to run only from the issuing of the patent, January 31, 1863. (*Richardson v. Williamson et al.*, 24 Cal. 289.)

Judgment reversed and cause remanded.

THE PEOPLE v. THOMAS BLACKWELL.

PRESENTMENT OF INDICTMENT.—It will be presumed that an indictment was presented to the Court by the Foreman of the Grand Jury, and in their presence, although that fact is not indorsed on it, if the record of the Court shows nothing to the contrary.

COUNTY COURTS.—County Courts are Courts of general criminal jurisdiction, and as such all intendments are in favor of the regularity of their proceedings.

ASSISTANT COUNSEL FOR DISTRICT ATTORNEY.—Whether the District Attorney should be allowed associate counsel to aid him in the management of a case is a matter resting in the discretion of the Court, and where there is no abuse of that discretion the appellate Court will not interfere.

EVIDENCE THAT WITNESS EMPLOYED ASSOCIATE COUNSEL.—If the District Attorney is assisted by associate counsel in the prosecution of a criminal case, counsel for the defense have a right to ask the prosecuting witness if he has employed such associate counsel.

APPEAL from the County Court, San Joaquin County.

The facts are stated in the opinion of the Court.

Tyler & Cobb, for Appellant.

The Court erred in refusing to set aside the indictment upon motion of defendant, upon the grounds stated in the motion. (Criminal Practice Act, Secs. 233, 278.)

Every fact necessary to give the Court jurisdiction should appear affirmatively in the record. It nowhere appears in the record that the indictment was presented to the Court by the Foreman of the Grand Jury, in the presence of the Grand Jury. Without being *in fact* so presented, the Court would have no jurisdiction to try it. If it was necessary that the *fact* should

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exist, it is most certainly just as necessary that the record should show the fact. Nothing will be presumed in favor of the jurisdiction of the Court. When jurisdiction is once acquired, then the rule is different. (*Powers v. The People*, 4 John. 292.)

The Court erred in refusing to allow defendant to ask the prosecutrix, upon cross examination, if she had employed Messrs. Budd & Carr, and Messrs. Heslep & Jenkins, to assist the prosecution of the defendant.

We had a right to the testimony upon two grounds: First — Because it is always competent to inquire of counsel at whose instance he appears as such, and *a fortiori* to inquire of the client as to whether counsel appears for him or at his request. Second — Because it went to the credibility of the witness' testimony. If she felt such an interest in the conviction of defendant as to hire the assistance of two eminent legal firms to assist the District Attorney in procuring a conviction, defendant had a right to show that fact, as a circumstance going to her credibility.

J. G. McCullough, Attorney-General, for the People.

Upon motion to set aside indictment, we cite Criminal Practice Act, Sec. 233. Don't require the indictment to *show* the presentation, etc. (*People v. Connor*, 17 Cal. 361; *People v. Hobson*, 17 Cal. 429, 363; Criminal Practice Act, Sec. 247; *People v. Mills*, 17 Cal. 277; *People v. Lawrence*, 21 Cal. 372.)

Upon the refusal of the Court to allow the prosecuting witness to be asked if she had employed associate counsel, we cite 1 Wharton Crim. Law, Sec. 474, etc.; *Byrd v. State*, 1 How. Miss. 250; *Jarragin v. State*, 10 Yerger, 530; *Rush v. Cavanaugh*, 2 Barr, Pa. 189.

By the Court, SHAFER, J.

Indictment for rape. Verdict — Guilty of assault with intent to commit a rape.

1. After arraignment the defendant moved the Court to set

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aside the indictment on the ground "that it does not show by the proper indorsement that it was presented to the Court by the Foreman of the Grand Jury and in their presence." The motion was overruled, and the defendant excepted.

The indorsement was as follows:

"Presented and filed in open Court, this 14th day of March, A. D. 1864.

"H. E. HALL, County Clerk."

The exception is not well taken. It may be admitted that it is a matter of jurisdictional consequence that an indictment should in fact be presented by the Foreman of the Grand Jury and in their presence, but that the indictment in question was so presented will be presumed, inasmuch as the record shows nothing to the contrary. The Criminal Practice Act prescribes no form of indorsement. County Courts, under the late amendments to the Constitution and the Act of April 20, 1863, passed in pursuance thereof, are Courts of general criminal jurisdiction, and as such all intendments are in favor of the regularity of their proceedings. (*People v. Connor*, 17 Cal. 361; *People v. Robinson*, 17 Cal. 368; *People v. Hobson*, 17 Cal. 424; *People v. Lawrence*, 21 Cal. 372.)

2. It appears from the record that the Court, by the request of the District Attorney, permitted other counsel to assist him at the trial. Before the trial commenced, however, the counsel of the appellant moved the Court to vacate the order. The motion was overruled and the defendant excepted.

It appears that the District Attorney had the active superintendence and management of the case during the progress of the trial. Whether the State, through him, should be allowed to avail itself of additional professional aid, was a matter addressed to the discretion of the Court, and there is nothing in the record showing that the Court abused its discretion in granting the request of the attorney. (*Commonwealth v. Williams*, 2 Cush. 582.)

3. On the cross examination of the prosecutrix, defendant's counsel asked the witness if she had employed Budd & Carr

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and Heslep & Jenkins to assist the District Attorney in the prosecution. The District Attorney objected to the question, on the ground that the proof was incompetent. The objection was sustained and the defendant excepted.

We cannot determine, nor is it either necessary or proper for us to inquire, what, if any, effect an affirmative answer to the question would have had on the minds of the jury. The defendant had a right to ask the question. If a witness retain counsel in a case to which he is not a party, and in the result of which he has no interest, it is a fact going to the credibility of the witness. The witness may have thus interposed on considerations of humanity, or of public justice, or he may have been influenced by private grudge; but the party against whom the witness is produced is always entitled to inquire of the witness as to the fact, and, if admitted, it goes to the jury for whatever it is worth; and such explanation of motives as the witness may give for his action goes with it. (1 Greenl. Ev. Secs. 449, 450; *Baker v. Joseph*, 16 Cal. 173.)

Judgment reversed and cause remanded for further proceedings.

HORACE ALLEN v. EDWARD FENNON.

MOTION FOR NEW TRIAL.—If no motion is made for a new trial in the Court below, the findings of the Court and verdict of the jury are conclusive as to the facts.

APPEAL from the District Court, Fourth Judicial District, Contra Costa County.

The facts are stated in the opinion of the Court.

H. Allen, for Appellant.

Edward Tompkins, for Respondent.

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By the Court, SAWYER, J.

This is an action to recover the possession of land. The Court tried the case without a jury. The issues as to title and wrongful possession were found against the plaintiff, and the defendant had judgment. No motion for a new trial was made. The appeal is from the judgment, and the error relied on is, that from the evidence appearing in the statement on appeal, the Court should have found the issue upon the title in favor of the plaintiff instead of against him.

It has been settled by a long series of decisions in this State that when no motion for a new trial has been made the findings of the Court and verdict of the jury are conclusive as to the facts. Such has always been the construction of the Practice Act as to cases at law, and it is now settled that the practice even in equity cases must be the same. (*Brown v. Tolles*, 7 Cal. 399; *Garwood v. Simpson*, 8 Cal. 108; *Rhine v. Bogardus*, 13 Cal. 73; *Duff v. Fisher*, 15 Cal. 379; *Gagliardo v. Hoberlin*, 18 Cal. 395.)

There is nothing in this case to take it out of the rule established by the cases cited.

Judgment affirmed.

Mr. Justice CURREY, being interested, did not participate in the decision of this case.

THE PEOPLE v. DAVID F. BATCHELDER.

OCCUPANCY OF AN ISLAND FOR GATHERING THE EGGS OF WILD BIRDS.—Persons in the casual and temporary occupancy of an island, a part of the public domain, engaged in the pursuit of hunting, fishing, or gathering the eggs of wild birds deposited there, and who do not occupy the land for purposes of husbandry, residence, or commerce, are not in such possession of the same as to entitle them to exclude others who desire to occupy it for a like purpose, or to justify them in resisting by force others who attempt to land upon it to engage in the same pursuit.

JUSTIFIABLE HOMICIDE.—If several persons are on an island, a part of the public domain, engaged in gathering the eggs of wild birds deposited there, and others attempt to land there to engage in the same pursuit, and their

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attempt to land is resisted by force by the party first there, they are justified in using such force as may be necessary to effect their object; and if one of the opposing party is slain, it will be justifiable homicide.

SAME.—If the persons attempting to land on the island are armed with guns, this does not affect their right to land; and if they are attacked by those on shore with deadly weapons and murderous intent, and their lives placed in danger, they are not obliged to retreat, but may stand their ground, and, if need be, kill their assailants.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Van Arman, Lane & Howe, for Appellant.

J. G. McCullough, Attorney-General, for the people.

By the Court, CURREY, J.

The defendant was indicted by the Grand Jury of the City and County of San Francisco, for the crime of manslaughter in the killing of Edward Perkins at the Farallone Islands, on the 4th of June, 1863. The defendant pleaded not guilty, and was afterward tried and convicted and sentenced to be imprisoned in the State Prison for one year. From this conviction and judgment he has brought the case to this Court upon a statement embodying all the testimony produced on the trial, in which is contained the charge of the Court to the jury, and also certain requested instructions on the part of the defendant, which the Court refused to give to the jury, together with the exceptions taken by the defendant to various rulings during the progress of the trial.

The evidence discloses that on the 3d of June, 1863, the defendant and some twelve or fifteen other persons repaired in vessels to the anchorage adjacent to the principal of the Farallone Islands, situated about thirty miles westward from the City of San Francisco, and there remained during the night of that day; that on the morning of the next day, between six and seven o'clock, a portion of this party attempted

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to land upon the island, when they were met at the shore by a guard armed with guns, who, by words, accompanied by menacing acts, warned them not to land. Upon thus being warned and threatened, the party so attempting to go on shore returned to their companions upon the vessels at anchor, where they were joined by all, or nearly all, the defendant's party, and were furnished with loaded guns, and the party, thus reinforced and equipped, made another attempt to land at a point upon the island a short distance from where the guard on shore were. Upon nearing the land, the shore party confronted them and again warned them off, but notwithstanding they were thus warned, the defendant's party continued to approach the island, for the purpose of landing thereon, when the shore guard opened fire upon them, which was immediately returned by a volley from the defendant's party, who were together in a boat. The shore party fired several shots after the first round, when the defendant's party retreated. By the first fire from the men on shore several persons were wounded, one of whom subsequently died, and by the fire from the defendant's party one of the shore guard, Edward Perkins, was killed.

The object which the defendant and his companions had in visiting the Farallone Islands was to gather the eggs deposited there in great abundance by wild sea fowls. Before the time of the collision which resulted in the death of Perkins and another, a number of persons known as the Farallone Egg Company had been engaged in procuring the eggs deposited by the wild sea birds upon this island and selling the same in the San Francisco market; and the shore party, of whom Perkins was one, were in the employment of this egg company. It appears from the testimony of some of the persons composing the shore party that their chief business was to guard the island for the benefit of the egg company, against the ingress of any other persons who might desire to visit it for the purpose of gathering eggs there. The egg company, it seems, claimed the exclusive right of gathering wild birds' eggs upon the island, as the prior occupants of it for that pur-

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pose. The defendant refused to acknowledge any such right, or to yield to such claim, and in attempting to avail himself of what he deemed a right common to all citizens, he met with resistance from an armed force, who assumed to be acting in the defense of what they claimed as their employers' prior and paramount right. Upon the trial of the defendant the question as to the right of the respective parties to occupy the island for the object of procuring the eggs deposited there by sea fowls was in some degree involved, and the further question as to whether the defendant and his party were acting in the necessary defense of themselves, when the deceased, Perkins, was slain, was also a legitimate subject of inquiry.

When a person is accused of a criminal homicide, and in his defense undertakes to justify himself on the ground that the person slain was the aggressor, and that his death was the result of force used in the necessary defense of the person of the accused, then the character of the conduct of the deceased, with the concomitant circumstances, as well as that of the accused, is a proper subject of investigation. While Courts and juries should be extremely cautious how they excuse the slayer of his fellow upon the pretext that the act was the result of a necessity, they should be equally careful not to find the accused guilty if it appears that the homicide was committed in the necessary defense of himself, or in the defense of those whom he is bound by natural law to protect and defend.

In charging the jury the Court left it to them to determine from the evidence whether the deceased and those acting with him were, at the time of the fatal rencounter, in the actual possession of the place where the defendant and his party attempted to land, and whether the defendant and his party had actual notice of such possession, and also whether he or they attempted at the time to forcibly enter and intrude into and upon such possession.

We have examined the evidence in the record with care and have not been able to find anything therein from which it could be inferred even, that the deceased and those engaged with him in resisting the landing of the defendant and his

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party, or their employers were in the actual possession of the place at which the defendant's party attempted to land, or had the right to prevent any persons who desired to land upon the island from doing so, or from engaging, in a peaceable manner, in the lawful business of gathering the eggs deposited there by the wild birds of the ocean. Both on the part of the prosecution and defense it seems to have been conceded on the trial, that the island was a part of the public domain of the United States, and it is not pretended that the Farallone Egg Company, or their servants, the armed guard, of which the deceased was one, had reduced the island, or any portion of it, to actual and exclusive occupation for the uses and purposes of husbandry, residence, or commerce. We are not disposed to extend the doctrine which recognizes the actual possessor of land for the uses to which land is ordinarily employed, as its owner, to the casual and temporary occupant, whose use of it is subordinate to the pursuits of hunting and fishing, or the gathering of the eggs of birds whose resting places are upon the islands of the sea. It would be equally reasonable to recognize in the hunter who had first penetrated the mountain wild in quest of game, the exclusive right to it as his hunting ground, as it would to accord to the Farallone Egg Company the right to the exclusive possession of the Farallone Islands, or any one of them, for the business of gathering eggs left there by wild birds. The defendant and his party had the right to enter upon the island, provided the Government, in the legitimate exercise of its proprietary and sovereign authority, made no objection; and we cannot but regard the resistance made by the shore party, of which the unfortunate deceased was one, to the landing of the defendant and his companions, as unwarranted by any principle of right and justice. Hence the fact that others were on the island for the purpose of gathering the wild birds' eggs there, at the time defendant attempted to land, did not impair in any degree his right to land and engage in the like business, nor justify such other persons in resisting the defendant's landing; and the Court

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ought to have so charged the jury when requested on the part of the defendant.

The Court was requested, on behalf of the defendant, to give certain instructions to the jury, some of which were given and others refused. Of those refused was the following among others, which is in these words:

“The fact that the defendant and others were armed with guns at the time of landing on said island did not of itself render the landing unlawful or justify the deceased and others in resisting such landing or attacking them while so landing. Therefore, if the jury find from the evidence that defendant and others armed with guns, while landing on said island were attacked by deceased and others with deadly weapons, and their lives placed in immediate danger, and that the fatal shot was fired by one of the party with defendant, under such circumstances and in necessary self-defense, it is justifiable homicide, and the jury ought to acquit.”

The evidence in the case did not show who fired the shot by which Perkins was killed, and the Court in its general charge to the jury instructed them that in order to convict the defendant it was not necessary that the evidence should show that the deceased was killed by a deadly weapon or gun discharged by the accused, but that it was enough if the evidence showed him to be an accessory to the unlawful killing; and in connection with this the Court clearly and accurately defined the character of an accessory. The requested instruction here set forth in *hæc verba* proceeded upon the hypothesis that the fatal shot was fired, not by the defendant himself, but by one of his party after being attacked by the deceased and those with him, and that the deceased was slain in necessary self-defense.

The act of bearing arms did not of itself affect the right of the defendant and his companions to land upon the island, nor justify the resistance and attack of the shore guard. The law justifies the individual who slays his adversary in his own necessary self-defense. The instruction as requested states as a postulate the true rule of law as applied to certain facts and circumstances assumed to have existed, and then declares fur-

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ther that if the jury should find from the evidence that the lives of the defendant and his companions were placed in immediate peril by the attack of the guard on shore, armed as they were with deadly weapons, and that the homicide was committed in the necessary self-defense of the lives of those so attacked, then such defense was justifiable.

The defendant also requested the Court to charge the jury in the following words: "The fact that defendant and those with him on the occasion of the alleged homicide, were armed with guns at the time of landing on said island (if the jury should be satisfied of such fact from the evidence) does not render the act of landing illegal, nor justify the deceased and those on the island with him in resisting such landing, or in attacking them while landing. Therefore, if the jury shall find from the evidence that defendant and those who were with him while attempting to land on the island on the occasion of the homicide, were attacked with deadly weapons and murderous intent by the deceased, and his life placed in immediate danger, he was not obliged to retreat, but might stand his ground, and, if need be, kill his assailant."

This requested instruction which was refused, as the one before considered, states as a basis a legal proposition exonerating the defendant and his party from the charge of an infraction of the law by the simple act of seeking to land on the island armed as they were, and at the same time involves the shore guard in the commission of a wrong in resisting such landing and in attacking the defendant and his party while attempting to land, and then proceeds to inform the jury if they should find that the defendant and his companions were attacked with deadly weapons and murderous intent by the deceased, by which the defendant's life was placed in instant peril, he was not obliged to retreat, but might at once act in his own defense, and if necessary slay his assailant.

Before the defendant had requested the Court to so charge the jury, they had been correctly instructed as to the law respecting justifiable homicide. The Court had informed them that in order to make the killing of a human being jus-

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tifiable it must be in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against any person or persons who manifestly intend and endeavor in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. And the Court had further instructed the jury that a bare fear of these enumerated offenses was not enough to justify the killing; but that it must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge; and also, that if one person kill another in self-defense it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary, and that it must appear also that the person killed was the assailant; or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given. (Act concerning crimes and punishments, Laws 1850, p. 232, Sections 29, 30, 31.)

The requested instruction last set forth comprehends the essential circumstances on which the right of self-defense, in the given instance, arose and depended, viz: defense of the person of the accused against the attack of the deceased, having at the time the means in hand, which he was using with murderous intent against the defendant. If the jury had been instructed to find as to these facts, and had found them to be true, and also that by means of the attack the life of the defendant was in immediate danger, or, in other words, that the danger was urgent and pressing, it would have appeared that these circumstances were sufficient to excite the fears of a reasonable person, and the jury, in such event, would have been bound to have inferred, as a sequence legitimately deducible from these constituent elements, the absolute necessity of the defense which resulted in the homicide committed.

Opinion of Sawyer, J., dissenting.

As appears from the charge given by the Court to the jury, the law specifies with careful particularity the essential circumstances which must precede the existence of the right to take life in self-defense. Whether the facts and circumstances developed by the testimony constituted a case of necessary self-defense, was to be passed upon and determined by the jury from the evidence, considered in subordination to the law on the subject. It was their province and duty to ascertain from the evidence, and to determine as to the alleged necessity of the act which resulted in the death of Perkins; and it was the right of the defendant to have the question submitted to them in a distinct and palpable form to answer by their verdict, whether the homicide was committed by the defendant, or any one of his companions, in his or their necessary self-defense; and it was also his right, if they should find the issue in this particular in his favor, to have the Court instruct them that their verdict should be in justification of the accused.

Many other instructions were requested on the part of the defendant which the Court refused to give to the jury. These it is not necessary to notice in detail, as what we have said is sufficiently comprehensive to embrace the various propositions embodied in the proposed instructions.

The judgment is reversed and a new trial ordered.

SAWYER, J., dissenting.

I do not think the right of possession of the Farallone Island, or the right to gather the eggs deposited thereon by wild birds, was in question in this case. The right might have been to some extent in question had a party in possession been indicted for slaying one of a party seeking to enter with violence against his will. But men have no right to go with arms and enter with force, even upon their own land, against other parties already there, armed and violently, though wrongfully, resisting. In a contest arising under such circumstances both parties are in the wrong, and if it results in the loss of life, caused while the contest actually continues,

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the slayer cannot shield himself upon the ground of self-defense without at least first showing some disposition to decline further conflict. The law furnishes peaceable remedies for injuries, and will not tolerate the pursuit of one's rights, even, in a manner liable to induce breaches of the peace and lead to homicide.

In this instance I think the Judge stated the law correctly, and submitted the case fully and fairly to the jury. The charge covered all the points necessary to enable the jury to consider the case intelligently and render a just verdict. I think there was no error in refusing the charges asked on the part of the defendant, and refused. I suppose it may be fairly assumed that the two instructions selected and commented on in the prevailing opinion as the grounds of reversal, are those least objectionable among the large number refused, and the ones which should have been given, if any. Yet, in my judgment, these instructions, without qualification, must necessarily have misled the jury. They wholly omit to bring to the notice of the jury the question as to whether the defendant's party prepared with arms to overcome resistance, were entering in a violent and hostile manner, knowing they would be show that they were. This element, as well as the unlawful act of the shore party was not the only element to be considered, for the approaching party might also be seeking to enter in an unlawful manner, and the evidence tended strongly to show that they were. This element, as well as the unlawful act of the shore party, should also have been taken into account, as the foundation of the legal proposition with which the instruction asked terminates. It cannot be said, as a legal proposition, under the circumstances of the landing shown by the evidence, that "the fact that defendant, and those with him on the occasion of the alleged homicide, were armed with guns at the time of landing on said island, does not render the act of landing illegal." And the instruction must be considered in the light of the testimony to which it was to be applied. Thus considered, the jury would be in effect instructed that the defendant, up to the time of firing the fatal shot, was

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pursuing a lawful right in a lawful manner. Yet the testimony shows that defendant's party went there with the knowledge that the party of the deceased were on the island, armed, for the purpose of resisting by force the landing of defendant and his associates; that defendant's party came prepared for a contest; that they first approached the island in a small boat without arms, and that, having been warned not to land by men in arms, and that their landing would be resisted, they returned to their vessel, increased the party to the number of fifteen or twenty, armed themselves with guns and returned prepared to overcome any resistance offered by those on shore; and that they advanced with loaded guns, protecting their persons while advancing by barricades, till after having been warned to stop without effect, a volley was discharged by the resisting party, which was immediately returned by the advancing party of defendant, and the deceased slain. The testimony as to which fired the first shot, before the volley fired by the respective parties, is conflicting. To say that such mode of landing is not, as a legal proposition, unlawful, is more than I am prepared to do; and yet such is the effect of the instructions asked and refused when considered in connection with the evidence to which they were to be applied. An advance of a party of fifteen or twenty men, with loaded guns, against another party, also armed, knowing that a deadly resistance to the advance will be made, is to court a conflict, and is of necessity a violent and forcible attempt to enter, and therefore unlawful. And it is none the less unlawful and wrongful, because the resistance is also unlawful. If to justify the homicide "it must appear," in the language of the statute, "that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow is given," he will certainly not be justified in inviting an attack in a violent manner, with arms in his hands, and upon the attack being made immediately slaying his opponent.

In other respects, also, the instructions are framed in such a manner as to make them liable to be misapprehended. The

Argument for Appellants.

Court, I think, was justified in refusing them. I am of the opinion, therefore, that the judgment should be affirmed.

JAMES OTIS, WILLIAM A. MACONDRAY, AND FREDERICK W. MACONDRAY v. WILLIAM HASELTINE, AND JAMES L. KING.

SPECIFIC CONTRACT ACT.—The Act of eighteen hundred and sixty-three, commonly called the "Specific Contract Act," applies to contracts made before as well as after its passage.

STATUTE OF FRAUDS.—An indorsement made by a third person on a contract entered into between two parties, and made simultaneously with the contract, by which the indorser, without expressing any consideration received, agrees that the undertaking of one of the contracting parties shall be fulfilled, is an original and not a collateral promise of the indorser to answer for the debt of another, and not within the Statute of Frauds.

SAME.—By such act the indorser makes the contract his own, and the consideration therein expressed becomes the consideration of his promise.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for Appellants.

"In the following cases, every agreement shall be void, unless such agreement, or some note or memorandum thereof, *expressing the consideration*, be in writing and subscribed by the party charged therewith. * * * 2. Every special promise to answer for the debt, default, or miscarriage of another." (Sec. 12, Act of April 19th, 1850.)

The plain reading of the statute is, that the promise must be in writing, and the writing subscribed by the party must *express* the consideration.

"That which the words declare, is the meaning; and neither Courts nor Legislatures have the right to add to or take away from that meaning." (Sedgwick on Stat. and Const. Law, 246; *Newell v. The People*, 3 Selden, 97; *Bidwell v. Whitaker*, 1 Michigan, 469, 479.)

Argument for Respondents.

In this new State, untrammelled by "judicial legislation," shall this statute be enforced as it reads, or shall it be frittered away by construction?

The language of King's undertaking shows that it was made subsequent to the execution and delivery of the agreement between plaintiffs and Haseltine: "I hereby agree to indorse * * as provided in the *within* agreement," i. e., the *within executed* agreement, not a draft of an agreement; if not executed, it was not an agreement, and the language, "within agreement," would not have been used. It follows, then, the consideration of Haseltine's contract did not attach to and uphold King's. (*Ellison v. Jackson Water Company*, 12 Cal. 552, 553; *Clay v. Walton*, 9 Cal. 328; *Purkett v. Bates*, 4 Ala. 390; *Doyle v. White*, 26 Maine, 341; *Packer v. Wilson*, 15 Wend. 343; *Hall v. Farmer*, 2 Comstock, 557.)

Sidney L. Johnson, for Respondents.

The question raised here is not an open one in this State. (*Jones v. Post*, 6 Cal. 104; *Haseltine v. Larco*, 7 Cal. 33.)

In New York, it has been fully settled by the decision of the Court of Appeals, in *Church v. Brown*, 21 N. Y. 315, in which the case of *Brewster v. Silence*, 4 Selden, 210, and other cases cited by appellants, are reviewed and commented upon. We refer to the exhaustive opinions of Mr. Justice Wright and Mr. Chief Justice Comstock in that case, as decisive of this case in our favor, both upon principle and authority. In *Church v. Brown*, the ruling in the *Union Bank v. Coster's Executors*, 3 Comstock, 203, is followed as the settled law. *Brewster v. Silence*, and *Draper v. Snow*, 20 N. Y. 331, are distinguished from them, and by Mr. Chief Justice Comstock and Mr. Justice Welles are held to have been decided in error. Upon the cases in California and New York, we are content to leave this point.

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By the Court, SANDERSON, C. J.

The plaintiffs sold by contract in writing to the defendant Haseltine a certain invoice of Chinese goods, for which Haseltine agreed to pay ten thousand dollars in gold coin of the United States; the goods to be sold at auction as then advertised and the proceeds to be paid to the plaintiffs by the auctioneers. If the proceeds proved insufficient to pay the ten thousand dollars, the balance was to be paid by Haseltine's note at sixty days, indorsed by his co-defendant King. This contract was signed by plaintiffs and Haseltine on the 29th of December, 1862. On the back of the contract, bearing the same date, is the following indorsement:

"I hereby agree to indorse William Haseltine's note as provided in the within agreement.

(Signed:)

"JAMES L. KING."

This indorsement was executed by King before the delivery of the contract to the plaintiffs, and before the delivery of the goods to defendant Haseltine. The ten thousand dollars were not paid by the proceeds of the sale, and the plaintiffs demanded the note called for by the contract. Defendants refused to give it, but promised to pay the balance in gold when due, which they failed to do, hence this action. Plaintiffs had judgment payable in gold against both defendants who appeal.

It is insisted upon behalf of both defendants that the judgment is erroneous so far as it directs payment in gold, because the contract was made before the passage of the so-called "Specific Contract Act" of 1863, and therefore not governed by its provisions. This question has already been decided by us in the case of *Galland v. Lewis*, 26 Cal. 46, in which we held that the Act applied to contracts made before its passage.

On the part of the defendant King, it is insisted that his contract was "a promise to answer for the debt, default, or miscarriage of another," within the Statute of Frauds, and

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void because it does not express the consideration. We think that this question also has been decided against the appellants in several cases in this State.

Evoy v. Tewksbury, 5 Cal. 285, was an action to recover rent. Evoy leased certain lands to one McMakin. At the foot of the lease, and on the day of its date, Tewksbury wrote and signed the following promise: "I hereby agree to pay the rent stipulated above when it shall become due, provided that the said McMakin does not pay the same." The Court held that this agreement was a part of the lease and not within the Statute of Frauds, but was to be regarded as an original undertaking, upon the strength of which McMakin obtained possession of the land and enjoyed its use.

In *Jones v. Post*, 6 Cal. 102, the agreement and the guaranty were in separate instruments, yet the Court construed them as one, and held that the consideration of the latter was sufficiently expressed in the former in order to satisfy the Statute of Frauds.

In *Hazeltine v. Larco*, 7 Cal. 32, the plaintiff, as master of the bark *Acadia*, entered into a charter party with one Nicholas Dabovich, and on the back of the same instrument the defendant Larco indorsed the following guaranty: "I, N. Larco, hereby guaranty the fulfilment of the within charter on the part of the charterer. Nicholas Larco."

It was conceded that the guaranty was made at the same time with the charter party, and that the consideration of the one was in fact the consideration of the other; and it was held that the two instruments were to be regarded as one, and that the two together constituted Larco's contract with the plaintiff; that by the reference to the "within charter" he made it a part of his guaranty for all purposes not expressed in the guaranty itself.

We are unable to distinguish between the foregoing cases and the present. The promise by King was made before the sale and delivery of the goods to Haseltine, and constituted in part the consideration for which the sale was made. The plaintiffs did not part with the goods upon the sole credit of

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Haseltine, but upon the credit of King as well, to the extent of his indorsement. So the facts are found by the Court below. Thus viewed, the undertaking of King was original and not collateral to the promise of Haseltine, the sale from plaintiffs to Haseltine being the consideration. But regarding King's undertaking as being within the Statute of Frauds requiring a note in writing expressing the consideration upon which it was made, we think the statute in that respect has been sufficiently complied with. His promise is indorsed upon the back of the contract between the plaintiffs and Haseltine, and therein he expressly refers to that contract; and it is apparent that the full nature and extent of his undertaking cannot be determined except by a reference to it. Instead of expressing in full the terms of his contract, as he might have done, he refers for that purpose to the principal contract. By so doing he made the language of that contract the language of his own. From that language the consideration of his promise clearly appears. It is not necessary that the consideration should be expressed in any set phrase. If it is obvious from the general language used it is sufficiently expressed to satisfy the statute. (*Church v. Brown*, 21 N. Y. 315.)

Judgment affirmed.

**DANIEL N. HASTINGS v. HUGH McGOOGIN AND
MARTIN ALVORD.**

ACT OF CONGRESS CONCERNING SUSCOL RANCHO.—The Act of Congress of March 3d, 1863, providing for the survey and sale to the purchasers from Vallejo of the land known as the Suscol Rancho, withdraws said land from the operation of the general laws providing for the disposal of the public lands.

SUSCOL RANCHO.—Prior possession by an inclosure, and a claim made before the Register and Receiver to purchase land, a portion of the so-called Suscol Rancho, within one year from March 3d, 1863, by one who was a *bona fide* purchaser from Vallejo, entitles him to recover in ejectment as against one who enters after March 3d, 1863, and claims the same land under the general pre-emption laws of the United States.

APPEAL from the District Court, Seventh Judicial District,
Napa County.

Argument for Respondent.

The facts are stated in the opinion of the Court.

Swan & Hays, for Appellants.

This Court will take judicial knowledge that the claim to the Suscol Rancho as a Mexican grant was finally rejected by the Supreme Court of the United States. (*Vallejo v. United States*, Black's Reports.)

The entry of defendants was authorized by the United States as the first step to be taken in her primary disposition of the land; and to oust defendants from the same by this suit is in violation of the Act admitting California into the Union, as it interferes with such primary disposition. (See said Act, Lester's Land Laws, 158, 159; Section 13 of Act to ascertain and settle the private land claims in the State of California, Lester's Land Laws, 177; Section 6 of Act of Congress, passed March 3d, 1853, to provide for survey of public land in California, the granting of pre-emption rights, etc., Lester's Land Laws, 207; Section 7 of Act of Congress, passed May 30th, 1862, to reduce the expenses of the survey and sale of public lands in the United States, Laws of Congress, 1861-2, p. 410; *Doran v. Pacific Railroad*, 24 Cal. 245.)

Whitman & Wells, for Respondent.

Plaintiff pretends to set up a pre-emptive claim to the premises, and urges this as good reason in law why judgment should not go against him.

The pretended entry of the defendants was upon unsurveyed lands at a time when such entry was unauthorized by law, the same only having been authorized, if at all, which we have before had occasion to question, by Act of May 30th, 1862. (12 U. S. Laws.)

The plaintiff held a title derived from Vallejo, and the Act of March 3d, 1863, has extended to all persons standing in that position the privilege of pre-emption, limited only by the extent of their possession at the time of the rejection of the Suscol grant.

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The case finds that they are proceeding to avail themselves of the privileges granted by that Act.

By the Court, SANDERSON, C. J.

Plaintiff sues to recover the possession of eight hundred and fifty acres of land. The complaint is in the usual form. The defendants answer separately, denying the allegations of the complaint, and further aver that each of them has settled upon one hundred and sixty acres of land and claims the same under the pre-emption laws of the United States. McGoogin further says that only forty acres of his tract is a part of the land sued for, and as to the remainder of the land described in the complaint he disclaims. The other defendant, Alvord, says that only eight acres of his tract is a part of the land described in the complaint, and he disclaims any interest in the residue. The case was tried by a jury, the plaintiff obtained a verdict and judgment in his favor, and the defendants appeal.

It appears from the transcript that the land in controversy is or was a part of the so-called Suscol Rancho, formerly claimed by Mariano G. Vallejo, under a grant from the Mexican Nation, which grant was held to be invalid by the Supreme Court of the United States in February, 1862, and the claim accordingly rejected. Previous to this rejection, however, the plaintiff had become a *bona fide* purchaser of the tract in question, under the supposed Mexican grant, and had inclosed the same by a fence. After the grant was rejected, in April or May, 1862, each of the defendants settled upon his tract and built a house, and has resided thereon ever since. On the 12th of October, 1863, the defendant McGoogin filed with the Register of the United States Land Office his declaratory statement giving notice that he claimed his tract under the pre-emption laws of the United States; and the defendant Alvord filed a like notice on the 18th day of November, 1863. On the 3d of March, 1863, Congress passed an Act authorizing the Commissioner of the General Land Office to cause the lines of the public surveys to be extended over the Suscol

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Rancho, and to have approved plats thereof duly returned to the proper District Land Office; and further providing that within twelve months after the return of such surveys it should be lawful for all *bona fide* purchasers from Vallejo or his assigns to enter according to the lines of such surveys the land so purchased, to the extent to which the same had been reduced to possession at the time said grant was rejected. Within the time prescribed by this Act the plaintiff made claim to the land in question under its provisions before the Register and Receiver of the proper Land Office.

It is unnecessary to notice defendants' exceptions in detail, the only question involved, generally stated, being whether, upon the foregoing facts, the verdict and judgment of the Court below was right, and of this we think there can be but little doubt. The facts bring the plaintiff clearly within the provisions of the Act of Congress specially providing for the disposal of the tract of public land in question. By the passage of that Act the land in question was withdrawn from the operation of the general laws providing for the disposal of the public lands and its disposal specially provided for before the defendants had filed their declaratory statement under the general law. The prior possession of the plaintiff, accompanied by this express license of the General Government, was sufficient to entitle him to recover.

Judgment affirmed.

Mr. Justice CURREY expressed no opinion.

JOHN N. KERNAN v. JOHN GRIFFITH.

SWAMP AND OVERFLOWED LANDS.—The Act of Congress of September 23, 1850, granting to California the swamp and overflowed lands within the State, vested in said State the absolute ownership of all said lands then undisposed of, and the title of the State in no way depends upon the issuance of a patent to the State by the United States.

SAME.—The State of California, since the 28th day of September, 1850, has had the absolute power of selling the swamp and overflowed lands within its limits.

SAME.—The Government of the United States has no right to determine by

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an *ex parte* survey of its own what are and what are not swamp and overflowed lands in this State.

EVIDENCE AS TO LAND BEING SWAMP OR OVERFLOWED.—One who claims a tract of land under a patent issued to him by this State, conveying the same as swamp and overflowed land is not bound, in an action of ejectment brought by him against one claiming under the Homestead Act, by a survey of the United States designating the same as high land, but may introduce evidence of the real character of the land.

SAME.—The fact, whether a given tract of land is swamp or overflowed, or dry land, cannot be determined by the separate decision of either the State or the United States, but must be settled by evidence given in the course of judicial proceedings.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

Defendant recovered judgment in the Court below, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

John B. Hall, for Appellant.

Tyler & Cobb, for Respondent.

By the Court, SHAFER, J.

This was an action of ejectment, brought to recover the possession of the northwest quarter of Section Number Seventeen, in Township Number Three south, Range Seven east, according to the surveys of public lands of the United States, in the County of San Joaquin.

The plaintiff claimed by title derived from John D. Winters, to whom the lands were patented by the State as swamp and overflowed lands, January 15, 1856, and who had purchased them under the Act of April 28, 1855. This claim the plaintiff sustained, *prima facie*, at the trial, by the introduction of the patent and a series of mesne conveyances terminating in himself.

The defendant, having proved that he, on the 20th of February, 1864, duly entered the lands in question in the office of the Register of the United States Land Office for the Stock-

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ton District, under the Homestead Act of 1862, gave, in evidence, the map of the survey by the Government of the United States of the township embracing the quarter section in controversy. The survey, from which said map was prepared, was made in December, 1854, and was approved by the Surveyor-General of the United States for the State of California, June 15, 1857, sixteen months after the issuing of the patent to Winters. It appeared by the map that the quarter section in dispute was high land, and not swamp and overflowed. The Court instructed the jury that the character of the lands was established conclusively by the Government survey, and under that instruction the jury returned a verdict for the defendant. The question is upon the correctness of that instruction.

The instruction was erroneous. The title of the State to the swamp and overflowed lands within its limits, was derived from the General Government under the Act of September 28, 1850. It was held in *Summers v. Dickinson*, 9 Cal. 554, that upon the passage of the Act of Congress referred to, the State became the absolute owner of all the swamp lands within her limits which had not been disposed of, and that the title of the State in no way depended upon a patent, the Act itself operating as a full and perfect conveyance *in presenti*. The Court arrived at the same conclusion in *Owen v. Jackson*, 9 Cal. 322, further holding, however, that a patent issued to the State under the second section of the Act, would have no operation except by way of further assurance. These decisions are not only in harmony with the language of the Act, when properly construed, but are fully sustained by the case of *Foley v. Harrison*, 15 How. 447, and the case of *Wilcox v. Jackson*, 13 Pet. 516. As late as November, 1858, Mr. Attorney-General Black, in an official communication to the Secretary of the Interior, held that "it was not necessary that a patent should issue in order to vest the title under the Act of September 28, 1850;" and in repeated instances circulars have been issued from the Department of the Interior in which the same view of the effect of the grant has been

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taken. In view of these authorities we are not at liberty to consider the question as an open one.

If the grant to the State was absolute, clothing the State presently with the "absolute power of disposing" of the lands falling within the description contained in the grant, as was held in the two cases cited from the 9th Cal., it follows that neither the United States, the grantor, nor the State, the grantee, could by any *ex parte* survey, or other proceeding of like character, determine or in any manner affect the rights of the other. True, by the second section of the Act of 1850, the Secretary of the Interior is directed, as soon as may be practicable after the passage of the Act, to make out a list and plats of the swamp and overflowed lands granted, and to transmit them to the Governors of the States respectively in which the lands may be situated; but this is a purely ministerial service, to be performed by the Secretary, not as agent of both parties, but as agent of the Government, and to enable it to advise itself as to the more minute description to be inserted in the further assurance which it proposed to give, and which the State might or might not call for in the election of the Governor. It is doubtful if the survey, which the Court below considered as decisive, was even admissible in evidence, but to hold that it concluded the rights of the plaintiff by its own vigor, would be to hold that the Act of 1850 contained a reservation of a power to the Government to defeat its own grant *in toto*, and that all the cases cited are erroneous. Did the grant, in fact, contain a stipulation of the character named, the saving would, on the principles of the common law, be null and void, on the ground that it would be utterly repugnant to the body of the Act. (1 Black. Com. 89.)

It is urged, on the part of the respondent, that the Act of Congress admitting California into the Union, states as a condition, that the people, through their Legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits. The Act was passed on the 9th of September, 1850, and thereafter, on the 28th of the same

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month, Congress, in the full exercise of its admitted powers, granted to the State absolutely all the public lands therein that were then swamp and overflowed; thereby presently segregating them, by clear and apt description, from the mass of the public domain, and reducing them to private ownership; and therefore, a survey of those lands thereafter by the Government cannot be considered as having any just relations to the power reserved to the United States by the Act under which California came into the Union.

The State has heretofore and is now determining for itself the position and extent of the swamp and overflowed lands within its limits, and is now, and has been since 1855, making sales and conveyances thereof, and those sales now amount to about one million of acres. On the other hand, the General Government has, by its own independent action in the prosecution of the public surveys, been engaged in determining for itself the location of the same lands, not with a view, however, of claiming them as its own, but with a view of disclaiming them whenever their exact extent and position should be ascertained to its satisfaction. Neither of the parties is bound by the action of the other. It is not the uncommon case of grantor and grantee making surveys respectively of the lands granted, which surveys are not in agreement with each other. In such case, if each party, assuming the correctness of his own survey, makes a conveyance on the basis of it, and the holders of the respective deeds fail to harmonize the conflict of titles between them, the controversy is to be determined by the Courts in due course of proceedings. In cases like the one at bar, the question will be, as it is here, a question of fact: Were the lands "swamp and overflowed" on the 28th of September, 1850, the date of the Government grant? And that question must always be responded to by the jury on evidence submitted to them and applicable to the question.

Judgment reversed and cause remanded.

Argument for Appellants.

JOSEPH MCGILLIVRAY v. DAVID EVANS, CHARLES BARTLETT, AND ELIZABETH GARRITY.

PARTITION OF WATER.—Water flowing in a ditch and owned by tenants in common cannot be mechanically partitioned. The only partition which a Court can make, which will definitely and permanently end disputes of tenants in common in water used for mining purposes, is to order a sale and a distribution of the proceeds.

OBJECT OF A PARTITION OF PROPERTY ITSELF.—The object of a partition of the property itself among tenants in common, is to enable each party to obtain the title to and the use for all future time, in severalty, of some definite portion of the property owned in common.

APPEAL from the District Court, Ninth Judicial District, Trinity County.

The facts are stated in the opinion of the Court.

George Cadwalader, for Appellants.

This proceeding is complex in every feature—and the decree therein, instead of finally adjusting the rights of the parties, will give rise to greater uncertainty, confusion and litigation than existed before the attempt of the plaintiff to have set off to him in severalty his part of an uncertain volume of running water—which swells and falls with the variations of the seasons, and though in contemplation of law divided into accurate parts, is only so on paper—the stream, after division as before, being but a single body of water with its irregular flow, through reaches and bends, over natural and contending with artificial obstructions which chance or design may place in its bed.

There may be power to order a sale and declare the respective interests of the conflicting claimants, but none to order the division of that which by reason of its absolute indivisibility must, after a theoretical separation, remain precisely in the same condition as before, and thereby give rise to the same litigation which the final decree was designed to end. In the nature of things and by the ordinary rules of common sense this must be so.

Argument for Respondent.

While we see it possible in some cases, such as where water is used as a motive power, in connection with large mills or manufactories, for a Court of equity, by its decree, to regulate its use, and declare the rights of various parties therein at fixed and stationary points, such as the head gate of a mill or manufactory, the water being the incident, as it were, to the mill property, and there being no common interest in all the property, but only in the use of the water.

In such cases there would seem to be an obvious necessity for the exercise of the power, which is well illustrated in the leading case (cited by opposite counsel) of *Smith v. Smith*, 10 Paige, 470.

W. W. Upton, for Respondent.

Since the inherent powers of a Court of equity are competent to the disposition of all questions that arise in a case of this kind (Story's Eq. Juris. 654-656; *Hansen et al. v. Willard*, 3 Fairf. 147), and will afford redress for every substantial injury (*Merced Mining Company v. Fremont*, 7 Cal. 325), it may be a question not essential in this case, whether or not the case is within the statute regulating partition of real estate. We think it is. The tenement is a ditch, and the water running in it; ownership of the ditch embraces and includes the land on which the ditch is constructed. (Ang. on Water-courses, 159.) The parties hold as tenants in common, and each has an estate of inheritance.

The right to running water, also, is real estate, and embraces the land covered with water, not only while mingled, but the ground where it is separated, and that over which it afterwards runs and is used. "The party does not appropriate the water" alone, "but the land covered with water." (*Crandall v. Woods*, 8 Cal. 136.) "It has none of the characteristics of mere personalty," it is "a corporeal right or hereditament," (*Hill v. Newman*, 5 Cal. 446.) And "although the soil may actually belong to the United States, a grant is presumed in favor of the occupant," ownership of *usufruct* interest pre-

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sents the question of "title to land." (*Conger v. Weaver*, 6 Cal. 556.) And it is real estate within the statute governing partition. (*Hughes v. Devlin*, 23 Cal. 501.)

Although the waters of the plaintiff and defendants are mingled together, there is no partnership relation existing between them, as neither has gain or loss in the other's business. (Story on Part. Sec. 3; Story on Contracts, Sec. 178.)

Tenants in common are not partners. (8 Greenl. 253; 9 Johns. 470; 2 Ib. 329; 15 Wend. 187; 2 Hall, 415; Steph. *Nisi Prius*, 2,368.)

There is nothing in the relation of the parties to prevent either party from taking his share of the water from the stream above the ditch, and thus sever the relation without any change of interest in the water, (*Kidd v. Laird*, 15 Cal. 161,) or selling his interest, and thus introducing a new party without consent of others.

The case of *Butte Canal Company v. Vaughn*, 11 Cal. 149, recognizes the condition and character of separate and distinct interests in running water as it exists, in fact, in our State.

By the Court, SAWYER, J.

This is an action for the partition of the water of a mining ditch, admitted to be owned by the parties as tenants in common. The three defendants are entitled to the first flow of twenty inches when the water is high, which, the Court finds, is to be measured without pressure. But in the summer, when the water is low, they are entitled to the first flow of one-fourth of the whole, provided one-fourth does not exceed twenty inches. The plaintiff is entitled to two-fifths, and the defendants to three-fifths of the remainder, after the twenty inches, or the one-fourth at low water, has been taken out. The answer alleges, that, as between themselves, the twenty inches is owned jointly by all the defendants, and that the three-fifths are owned by two of them only—but the Court does not find how the defendants hold, as between themselves. The defend-

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ants appear to use the water for mining purposes, and the plaintiff formerly used his for irrigating his garden, and for sale to miners—the parties dividing it among themselves. Upon the facts found, the Court ordered the water to be divided, according to the proportions ascertained to be owned by the plaintiff and defendants respectively, and appointed three Commissioners to make the division in pursuance of the order of the Court, and to report at the next term. Two of the Commissioners presented a report, in which they say: “We first, by means of a box and gate, placed in the end of said ditch where defendants were wont to take out their twenty inches of water, divided or separated from the main body of the first flow of the water twenty inches thereof, without pressure, in the same manner as it was measured when first sold in 1852, as directed by the Court in said order, so arranging the gate in the box as to slide up or down, as the quantity of water in the ditch varies, which said twenty inches of water we turned out to and set apart for said defendants, which will flow to them constantly all the year round. The balance or remaining portion of said water of said ditch, described in said commission, we divided at the lower end of said race between the plaintiff and defendants, giving to the said plaintiff two fifths of the water, and to the defendants three fifths thereof. The said division of water was made in the following manner: After we had separated and set off to the defendants twenty inches of the first flow of the water (as it run in the ditch) we partitioned the balance by means of a division box, placed at the lower end of said ditch, with five equal apertures arranged side by side on the same level in such manner that the water of the ditch, whether low or high, will flow out through said five openings in equal quantities; three fifths of said balance of water, after flowing through three of said openings, falls into a ditch of the defendants and flows off to them, it being optional with them to keep it separated into three parts or to mingle it. The other two fifths of said balance of water flows through two of said apertures and falls into a ditch of the plaintiff, and thus flows to him.”

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The other Commissioner dissented, and made a counter report, in which he maintains that the water is not properly divided; that the defendants do not get their full amount of the first flow by the division made; that it is impracticable to make a just and permanent partition of the waters; and that any such attempted division would prove greatly injurious to the interests of the parties. The Court adopted and confirmed the majority report, and made a final decree in accordance therewith, in which it was "ordered and adjudged that said report stand, and the same is the judgment of the Court in partition to be of perpetual effect between the plaintiff and said defendants," etc.; to all of which proceedings defendants objected, and excepted, and they now appeal from the judgment.

Appellants allege that the court erred in assuming to make a partition of the water in the mode provided by the judgment. It would, to our minds, be utterly impracticable for the Court to make a mechanical division of the water running in a ditch, owned by tenants in common, and used for mining purposes, in such a manner as to permanently do justice between the parties. The object of a partition of the property itself is to enable each party to obtain the title to, and the use for all future time, in severalty, of some definite portion of the property owned in common, and thereby permanently end all disputes and remove all obstructions to its free enjoyment. In the case of two mills upon a stream comparatively constant in its flow, which are permanently located at a permanent dam upon its banks, and to which a right to the use of the water of the stream for propelling them is appurtenant, and where permanent gates and gauges may be fixed, it is possible, perhaps, to arrange a division of the water in such a manner as to approximately do justice between the parties. The Chancellor so thought in *Smith v. Smith*, 10 Paige, 470. But in the case of water conducted in ditches for mining purposes, the circumstances are entirely different. The use of the water is rarely had for any considerable length of time at the same point. When the claim of a miner is

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worked out he must remove to another. There is occasion continually to change the point at which he uses the water and at which he takes it from his ditch. Besides, when a given quantity is to be taken out of the first flow of the stream, without pressure, where the amount of water in the ditch is subject to great fluctuation, gates must be arranged so as to increase or diminish the aperture through which the water is discharged, according as the amount of water increases or diminishes, as was actually done in this instance. But the Court cannot say at what point the gate shall stand to-morrow, or next day, or the next—nor can it take upon itself the appointment of an officer, to stand at the gate, and gauge it in accordance with the ever changing current of the stream. An adjustment of the “apparatus” which would make a perfectly fair division to-day, might produce an entirely different result to-morrow. This partition is to be “of perpetual effect,” and to be “of perpetual effect,” it would be necessary to take the water out at that particular point, through the box placed there by order of the Court, by means of which the partition is made, whether the parties can any longer make it available for their mining purposes at that point or not. It is manifest that partitions, made upon this theory, cannot, ordinarily at least, be permanent without working great injury to the parties. In the language of appellants’ counsel: “The water to be valuable must follow the mines, and be used at those points where the mining claims are situated, which involves the necessity of shifting the ditch line from place to place, and the construction of extensions and lateral ditches, as new occasions require.” The ditch and the right to take the water from the creek above in this case, are still held in common, and the expenses of keeping the ditch in repair must still be a common charge. There is no partition, except of the water. It is manifest that the Court has assumed a duty that is utterly impracticable for it to perform. The Court may determine the rights of the parties, and ascertain and adjudge the amount of interest which each party holds; but it cannot assume to make a mechanical division of a material which, from its

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nature and the nature of the uses to which it is applied, is incapable of any permanent division that shall do justice between the parties. The only partition that the Court can make, which will definitely and permanently end the dispute of the parties and do justice between them, is to order a sale and distribute the proceeds.

In this case the Court did not attempt to make a complete partition. It only divided the water between the plaintiff, on one side, and the three defendants, as one party, on the other. The record shows that the three defendants owned the twenty inches jointly, and two of them three fifths of the remainder. The defendants demanded that the twenty inches should also be partitioned among them; but it was not done, and it is obvious that it would be utterly impracticable for the Court to adjust such complicated interest by a single mechanical division by means of boxes, gates and gauges to permanently remain. An attempt to do it would be, not to end, but to encourage and multiply litigation to an unlimited extent.

The necessary facts to enable the Court to make a proper distribution of the proceeds, on a sale, do not appear in the findings, and a new trial will be necessary.

Judgment reversed and a new trial ordered in pursuance of the principles indicated in this opinion.

By the Court, SAWYER, J., on petition for rehearing.

The correctness of our decision is not questioned in the petition for rehearing. A rehearing seems to have been asked on the supposition that the District Court was directed to enter a judgment ordering a sale of the property and division of the proceeds. But such is not the order. The order is: "Judgment reversed and a new trial ordered in pursuance of the principles indicated in this opinion." When the case goes back a new trial will be had. The plaintiff prays for a partition. If a partition is to be had, it can only be made by a sale and a division of the proceeds. Plaintiff now urges that upon the pleadings a partition would not necessarily follow;

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that other relief may be had which will accomplish the object of the parties. These questions do not arise upon this appeal. Upon a new trial the Court will doubtless afford such relief as it judges the parties may be entitled to upon the pleadings and facts established on the trial. The defendants do not appear to demand affirmative relief, they simply submit to a partition, but insist that they are entitled to a larger share than is accorded to them in the complaint, and that, if a partition is decreed, it should be made according to the interests as claimed in the answer. If the pleadings do not present the questions which the parties desire to litigate and have determined, in view of the fact that a mechanical division of the water cannot be had, perhaps the suit might be dismissed, and another commenced upon another theory, or parties might arrange to amend. At all events, when the cause goes back for a new trial, the parties can pursue such course as they may deem their interests to require. We do not see that a different judgment could be entered upon this record.

A rehearing is denied; but, to guard against misapprehension, the order for judgment is modified so as to read: Judgment reversed and new trial ordered.

P. A. LAMPING & CO. v. J. HYATT AND J. G. JOHNSON *et als.*

JUDGMENT MUST FOLLOW SUMMONS AND PRAYER OF COMPLAINT.—If judgment is rendered in favor of plaintiff by default, the Court cannot grant any greater relief than is demanded in the prayer of the complaint and specified in the summons.

JUDGMENT AGAINST PERSONS NOT NAMED IN THE COMPLAINT.—If persons are served with summons who are not named in the complaint, either by real or fictitious names, it is error to render judgment against them by default.

JUDGMENT NOT TO EXCEED AMOUNT PRAYED FOR.—If the complaint on a promissory note prays for judgment for a sum certain, which sum is the principal and interest due when the complaint is filed, judgment by default should not include interest accruing after the complaint is filed.

JUDGMENT FOR INTEREST WHERE RATE IS NOT NAMED.—If the prayer for judgment asks for interest to accrue after the complaint is filed, and neither the prayer or summons mention the rate of interest, the clerk should not render judgment for a rate greater than ten per cent per annum.

Statement of Facts.

GOLD COIN JUDGMENT.—If the complaint does not pray for a gold coin judgment, and the summons does not say that judgment will be taken for gold coin, the clerk should not, on default, render a gold coin judgment.

WHAT IS NOT GOLD COIN CONTRACT.—If a promissory note has the words "in gold coin" after the words "value received," but does not contain the words "in gold coin" in the promise to pay, judgment should not be rendered payable in gold coin, although there is in the instrument a subsequent promise to pay the difference between the value of gold coin and paper currency of the United States if not paid in gold coin.

APPEAL from the District Court, Tenth Judicial District, Sierra County.

The complaint set forth in words and figures the following promissory note as the cause of action:

"DOWNIEVILLE, May 20th, 1863.

"One day after date, for value received in gold coin of the Government of the United States, we, the Red Star Co., promise to pay to the order of P. A. Lamping & Co., at their banking house, in Downieville, five thousand dollars, with interest at the rate of three per cent per month, payable monthly in advance, and if the said principal sum and the interest thereon is not paid in gold coin of the United States, at maturity, then, in that case, for value received, we, the Red Star Company, undertake and promise to pay to the order of the said P. A. Lamping & Co., in addition to the said sum, as settled damages, such further sum as may be equal to the difference in value, in the San Francisco market, between such gold coin and the paper currency of the United States, that is now, or may hereafter be made, legal tender, by laws of the United States, or of this State.

"J. HYATT,

"Secretary for Red Star Company.


"J. G. JOHNSON, Treasurer.

"L. G. WRIGHT."

The defendants declared against in the complaint were J. Hyatt, J. G. Johnson, L. G. Wright, J. Dasey, J. Lewis, Wm. Watkeys, H. Benning, C. Currieux, B. Fales, T. Roper, — Hayner, Wm. Dasey, D. Mahoney, P. Connor, John Doe,

Argument for Appellants.

Richard Roe, *et als.*, composing the Red Star Co. There was no allegation in the complaint that any of the defendants were sued by fictitious names, or that their real names were not known. The summons followed the complaint in giving the names of the defendants. The Sheriff served the summons on Rosana Hohner, Charles Killinglehoven, M. Welch, and Catherine Miller, persons not named in the complaint, in addition to those named. The Sheriff certified in his return that all the persons served were members of the Red Star Company. There was no appearance on the part of any of the defendants. The clerk rendered judgment by default against all the defendants served.

The following was the prayer of the complaint: 

"Plaintiffs therefore pray that they may have judgment against said defendants for the full sum due on said note, which is five thousand three hundred and five dollars."

The summons stated that if defendants failed to appear and answer, plaintiffs would take judgment against them by default for the sum of five thousand three hundred and five dollars, together with interest and costs.

Suit was commenced August 15th, 1863, and judgment was rendered September 28th, 1863, for the sum of five thousand three hundred and five dollars, and interest on said sum at three per cent per month from the 20th day of May, 1863, and that it be collected and enforced in gold coin.

Williams & Johnson, for Appellants.

The judgment was by default, and the relief in such cases can never exceed that claimed. (See Practice Act, Sec. 147; 11 Cal. 19; 20 Cal. 91; 20 Cal. 628.)

Plaintiffs do not claim interest after the 15th of August, 1863, therefore we had a right to suppose they had waived that claim, which they had a right to do.

The Court certainly erred in giving plaintiff judgment for the three per cent per month, when they did not ask it, or apprise defendants of any such claim; and also erred in giving interest on interest.

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As the judgment now stands, defendants are damaged, in the way of interest, in the sum of one hundred and fifteen dollars per month, even allowing that the judgment should rightfully draw ten per cent per annum. Up to the present time, upon the last named error, we are damaged one thousand three hundred and eighty dollars; add thereto the sum of six hundred and seventy-nine dollars, for which judgment was taken over the correct sum, and we find ourselves damaged to the full sum of two thousand and fifty-nine dollars.

The notice in the summons not specifying any rate of interest, the judgment can only draw ten per cent per annum. (See 6 Cal. 268.)

Vanclief & Gear, for Respondents.

By the Court, SAWYER, J.

As suggested by respondents' counsel, there is no statement in the record that can be considered. But, on the other hand, none is required, for the errors appearing in the judgment roll, brief as it is, are manifest and manifold. There is no congruity between any two of the documents constituting the judgment roll.

The summons, in stating the relief demanded, goes beyond the prayer of the complaint; the officer's return shows a service on parties not mentioned in the complaint or summons, either by real or fictitious names; the judgment is against all the parties served, and, as to the relief granted, goes even beyond the relief stated in the summons to be demanded, and exceeds that which the contract sued on would authorize, even had it been embraced within the terms of the prayer of the complaint or the summons.

The judgment is by default, and the Court was therefore not authorized to grant any greater relief than is demanded in the prayer of the complaint and specified in the summons. (Practice Act, 147; *Rawn v. Reynolds*, 11 Cal. 19; *Page v. Rogers*, 20 Cal. 91, 628.)

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The prayer is, that plaintiffs "may have judgment against said defendants for the full sum due on said note, for principal and interest, which is five thousand three hundred and five dollars." This was the full amount, principal and interest, due on the day the complaint was filed, August 15, 1863. It is a prayer for the specific sum named and no more. There is no prayer for interest to accrue from that time forth, and no rate of interest specified in the summons for which judgment would be taken. Had there been a prayer for "interest," without specifying the rate in the prayer or summons, the Court would not even then have been authorized to enter judgment for a rate greater than ten per cent per annum. (*Lattimer v. Ryan*, 20 Cal. 633.) But the judgment is for "five thousand three hundred and five dollars and interest on said sum at three per cent per month, from the 20th day of May, A. D. 1863, until paid." May 20, 1863, is the date of the note. Yet the interest from May 20th to August 15th, the day when the suit was commenced, had already been added to the principal and formed a part of the said sum of five thousand three hundred and five dollars. So that the judgment calls for interest on the principal sum twice during the period between those dates, and interest on the interest during the same time in addition, as well as interest on the whole sum at three per cent per month for the future till paid. The judgment is erroneous as to the entire amount exceeding five thousand three hundred and five dollars and the costs.

The judgment is "to be enforced and collected in gold coin." In this respect also the judgment exceeds the relief prayed for. The prayer is simply for so much money without specifying the kind of money. Nor does the summons say that judgment will be taken in gold coin.

In this respect also, the relief exceeds that authorized by the contract, for there is no promise in the note to pay in gold coin.

The record furnishes the data for correcting the judgment, and if the respondent desire it, the judgment may be modified so as to be entered for the sum of five thousand three

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hundred and five dollars only, and costs of the Court below against such defendants as are mentioned in the complaint. It is therefore ordered that the respondents have fifteen days in which to file their written consent that the judgment be modified in accordance with the views expressed in this opinion, and upon filing such written consent, it is ordered that the judgment be modified in pursuance thereof. In default of filing such written consent it is ordered that a judgment be entered reversing the judgment of the Court below and remanding the cause for further proceedings.

It is further ordered that the appellants recover their costs of appeal.

JAMES R. BOLTON v. JAMES LANDERS. (No. 1.)

ABATEMENT OF ACTION.—The pendency of an action to quiet title to land, will not abate a subsequent action between the same parties to recover possession of the same land, in which the same facts are litigated.

DENIAL OF LANDLORD'S TITLE BY TENANT.—If a tenant denies his landlord's title, the denial makes him a trespasser, and he is not entitled to notice to quit before the commencement of an action by the landlord to recover possession of the premises.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The complaint was in the usual form in ejectment. The answer denied the allegations of the complaint, and set up in abatement of the suit the pendency of an action brought by defendant and his wife against plaintiff. The suit pleaded in abatement was brought by Landers and wife against Bolton, to quiet title to the same premises in controversy here. It was stipulated in this case that the statement in *Landers and Wife v. Bolton*, should be the statement in this case. The facts are found reported in the case of *Landers and Wife v. Bolton*, 26 Cal. 393.

Plaintiff recovered judgment, and defendant appealed.

Opinion of the Court on Petition for Rehearing.

Bennett & Love, for Appellant.

Daniel Rogers, and *S. A. Sharp*, for Respondent.

By the Court, CURREY, J.

This action is brought to recover the lands described in the complaint in the case of *Landers and Wife v. Bolton*. It involves the same questions decided in that case, and they must be determined in the same way.

The plea in abatement of the pendency of the action in the case of *Landers and Wife v. Bolton* cannot defeat this action. Although the same questions are litigated in both, the relief sought is different.

The effect of the denial of plaintiff's title by defendant was to make him a trespasser, and he was not entitled to notice to quit. (*Smith v. Ogg Shaw*; 16 Cal. 88; *Ingraham v. Baldwin*, 5 Seld. 46, 47.)

Judgment affirmed.

Mr. Justice SAWYER expressed no opinion.

By the Court, SHAFTER, J., on petition for rehearing:

Petition for rehearing. In the case of *Landers and Wife v. Bolton*, 26 Cal. 393, which was a suit to quiet title, the defendant, Bolton, claimed in his answer that he was the owner of the premises and set forth a deraignment of his title. A deed from French and Robinson to the defendant was the last link in the chain, and the making of the deed was not denied by the replication. It was stipulated in *this* case that all the "testimony given on the trial of *Landers v. Bolton* should be deemed as having been given in *Bolton v. Landers*;" and it was further stipulated that "all the papers on file in *Landers v. Bolton* were in evidence in this case." The complaint in *Landers v. Bolton* was a "paper," and so were the answer and replication; and all these papers were on "file" in that case, and both papers were in evidence in this

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case, according to the stipulation; and being in, they proved *prima facie* in this case, what the two taken in connection proved conclusively in the other, to wit: the conveyance by French and Robinson to Bolton.

Petition for rehearing denied.

Mr. Justice SAWYER delivered the following dissenting opinion, in which Mr. Chief Justice SANDERSON concurred:

We think a rehearing should be granted, on the ground that in this case there is no evidence of a conveyance from French and Robinson to Bolton. The pleadings in this case raise the issue. We do not think the stipulation authorizes the facts admitted by implication by the pleadings in the case of *Landers and Wife v. Bolton* to be taken as evidence in this action. Without so regarding the facts thus admitted, there is no evidence of a conveyance to Bolton.

JAMES R. BOLTON v. JAMES LANDERS. (No. 2.)

JURISDICTION OF SUPREME COURT.—The Supreme Court has no jurisdiction in an action to recover a money judgment where the amount of the judgment, exclusive of costs, is less than two hundred dollars.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Bennett & Love, for Appellant.

Robert C. & Daniel Rogers, for Respondent.

By the Court, SAWYER, J.

This was an action to recover two hundred dollars rent, commenced in the Court of a Justice of the Peace. The defendant set up title, and the case was transferred to the District

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Court of the Fourth Judicial District for trial, in which Court judgment was rendered for two hundred dollars, and costs of suit amounting to thirty-eight dollars and twenty-five cents. Defendant appeals. Respondent moves to dismiss the appeal for want of jurisdiction, on the ground that the amount of the judgment does not exceed two hundred dollars, the limit prescribed by the old Constitution. Appellant insists that the costs should be considered as a part of the amount in dispute, at least that portion of the costs which accrued in the Justice's Court. The costs, whether they accrued in the Justice's or District Court, stand upon the same footing. They are all costs in whatever Court accrued—nothing more or less. It is the settled construction in this State that costs constitute no part of the matter in dispute within the meaning of section four, Article VI, of the Constitution. They are merely incidental to the action. (*Dumpley v. Guindon et al.*, 13 Cal. 30; *Votan v. Reese*, 20 Cal. 90.)

The amount in dispute not exceeding two hundred dollars, this Court has no jurisdiction. The appeal is therefore dismissed.

LUCY HARPER, ADMINISTRATRIX, ETC., v. PETER O. MINOR, MARY ANN WILLIAMS, ISAAC BRANHAM, FREDERICK HALL, AND FREDERICK A. HEHN.

APPEAL FROM A JUDGMENT.—On an appeal from a judgment, where there is no statement, the Supreme Court will only consider matters appearing in the judgment roll.

ORDERS NOT PART OF JUDGMENT ROLL.—If the appellant desires to have any intermediate orders, not forming a part of the judgment roll, reviewed on an appeal from a judgment, he must bring them into the record by means of a statement, together with such facts forming the basis of the orders as are necessary to explain the action of the Court below.

STATEMENT ON MOTION FOR A NEW TRIAL.—The office of a statement on motion for new trial is to bring into the record those matters only which arise in the progress of a trial, and constitute the basis of the motion under the fifth, sixth, and seventh subdivisions of section one hundred and ninety-three of the Practice Act, and which the appellant desires to have reviewed on appeal from the order granting or refusing a new trial.

STATEMENT ON APPEAL.—The office of a statement on appeal is to bring into

Points decided.

the record those orders and rulings, together with the facts necessary to explain them, which are made in other stages of the proceedings in the case, and not during the progress of the trial, and not contained in the judgment roll.

REVIEW OF QUESTIONS OF LAW ARISING DURING THE TRIAL.—An appellant who does not wish to raise any questions in the appellate Court as to the sufficiency of the evidence, may have questions of law arising in the progress of the trial reviewed, by making a statement of such rulings, with sufficient evidence to show their materiality, or may embody them in a bill of exceptions, and in this way have them reviewed on appeal from the judgment.

WHAT EVIDENCE SHOULD BE CONTAINED IN STATEMENT.—If the appellant insists that the verdict is not supported by the evidence, the statement should state in what particulars it is insufficient, and contain all the evidence on the point or points relied on, but the evidence not bearing upon the point or points relied on is irrelevant.

ORDERS AND RULINGS IN STATEMENT.—The statement on appeal should contain only such orders and rulings as the appellant desires to have reviewed, and the facts necessary to explain the action of the Court below thereon.

COSTS OF IRRELEVANT MATTER IN RECORD.—When irrelevant matter to any considerable extent is introduced into the record on appeal, the Supreme Court will visit the party who insisted upon its introduction with the costs of that portion of the record, whether he succeeds upon the merits of the case or not.

TIME TO GIVE NOTICE OF MOTION FOR A NEW TRIAL.—The District Court has power, without the consent of the parties, upon the application of the party intending to move for a new trial, and upon good cause shown, to extend the time within which to give notice of such motion thirty days beyond the time prescribed by the one hundred and ninety-fifth section of the Practice Act.

TIME TO FILE STATEMENT ON MOTION FOR NEW TRIAL.—If the time for giving notice of motion for a new trial is extended by the Court, the party to whom the extension is given has five days from the time notice is given within which to file his statement, as an absolute right, and the Court has power to extend the time twenty days further.

STATEMENT ON APPEAL.—If the party who appeals from a judgment does not file and serve a statement on appeal within twenty days from the date of the judgment, his right to make a statement is waived.

RECORD ON APPEAL.—On an appeal from an order dismissing a motion for a new trial, when the only point is as to whether the statement was filed in time, it is not necessary to insert the statement itself in the record.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

J. B. Hart, for Appellants.

Patterson, Wallace & Stow, for Respondents.

By the Court, SAWYER, J.

There are three appeals embraced in this record:

Firstly — An appeal from the judgment.

Secondly — An appeal from an order subsequent to judgment dismissing plaintiffs' motion for new trial.

Thirdly — An appeal from an order subsequent to judgment, striking from the files of the Court plaintiffs' statement on appeal.

On an appeal from the judgment, where there is no statement, we can only consider matters appearing in the judgment roll. This has been so often held, and so long settled, that there ought to be no further occasion to repeat it. The Practice Act states explicitly what papers shall constitute the judgment roll. They are, in a case where an answer has been filed, "the summons, pleadings, verdict of the jury, or finding of the Court, and all bills of exceptions taken and filed in said action; and a copy of the judgment, and any orders relating to a change of the parties." (Sec. 203.) The statute also defines a bill of exceptions.

The finding filed January 13, 1864, is the finding upon which the judgment appealed from is based. All between that and the pleadings drop out of the case, and have no place in the transcript on appeal from the judgment, unless brought in by a statement on appeal. The report of the referee is simply a report of the testimony upon which the Judge based his findings. It forms no part of the judgment roll. Neither do the minutes of the Clerk, nor the intermediate orders of the Court, except "orders relating to a change of parties," form any part of the judgment roll. If an appellant desires to have any intermediate orders affecting the judgment appealed from, and not forming a part of the judgment roll, reviewed, he must, by means of a statement on appeal, bring them into the record, together with such facts forming the basis of the orders, as are necessary to explain the action of the Court below. It is for this very purpose that the party is authorized by law to have a statement on appeal annexed to the record of the judgment, or the order from which the appeal is taken.

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The office of a statement on motion for new trial, is, to bring into the record those matters only, which arise in the progress of the trial, and constitute the basis of the motion under the fifth, sixth and seventh subdivisions of section one hundred and ninety-three of the Practice Act, and which the party desires to have reviewed on appeal from the order granting or refusing a new trial; that of a statement on appeal, those orders and rulings together with the facts necessary to explain them, which are made in other stages of the proceedings in the case, and not during the progress of the trial, and not contained in the judgment roll. A party, however, who does not wish to raise any question as to the sufficiency of the evidence in this Court on an appeal from an order granting or refusing a new trial, but only desires to have rulings upon questions of law arising in the progress of the trial reviewed, may introduce such rulings upon questions of law, with sufficient evidence to point them, into his statement on appeal, or make a bill of exceptions as he proceeds, and in this manner have them reviewed on appeal from the judgment, thus obviating the expense of bringing up the evidence in a statement on motion for new trial. And, as it has long been the settled doctrine of this Court, that it will not balance conflicting evidence, or reverse a judgment on the ground of insufficiency of evidence, unless it is very clearly manifest that the evidence does not justify the verdict or findings, it is rarely useful to bring up the evidence, and the mode here suggested is ordinarily the better practice. Under the law as it now stands, it is still more rarely necessary, or proper, to bring up all the evidence, or even introduce all into a statement on motion for new trial. In a great majority of cases in which it is claimed, that the evidence is insufficient to support the verdict, the insufficiency relied on is confined to one or two points at most. The only contest in such cases is as to those points, and the statement should "specify the particulars in which such evidence is alleged to be insufficient", (Practice Act, Sec. 195), and the testimony introduced into

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the statement should be confined to those points alone. "The statement shall contain so much of the evidence or reference thereto as may be necessary to explain the particular points specified, and no more." (Ib.) All testimony not bearing upon, illustrating, or obviating the objection specified, is irrelevant to the case made, and worse than a useless incumbrance of the record.

So, also, only such orders and rulings, and the facts necessary to explain the action of the Court below thereon, as the appellant desires to have reviewed, should be brought into the statement on appeal. Much less should a transcript be incumbered with them, when the appeal is from the judgment, where there is no statement on appeal. The practice often pursued by parties, or clerks — wherever the fault may be — of copying into the transcript all the orders and minutes of the Court below, is reprehensible in the extreme. It only involves parties in enormous expenses which are utterly useless, and imposes great labor on the appellate Court in endeavoring to ascertain what part of the transcript is really before it. The record now before us contains several hundred folios, at least, that should have no place in the transcript. We cannot consider it, now it is here. And the real question raised on the merits in the appellant's brief arises on that portion of the transcript, which, for reasons already stated, is not properly before us; and, judging from the size of the printed book constituting the transcript, the cost of this useless matter must have amounted to several hundred dollars, for all which the persons having the matter in charge, and not the law, are responsible.

Sometimes the party opposing a new trial, or the respondent on appeal, insists upon introducing a large amount of irrelevant matter into the record. In all cases of abuses of the kind referred to, when it is clearly manifest that irrelevant matter to any considerable extent has been introduced into the record upon the instance of either party, and the question is properly presented, we shall not hesitate to visit the party who insisted upon its introduction with the cost of that por-

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tion of the transcript, whether he succeeds upon the merits of the case or not.

In the case of *Hutton v. Reed*, 25 Cal. 478, the case of *The Estate of James Boyd*, 25 Cal. 511, and in the present case, as well as some others, we have endeavored to indicate distinctly what we deem to be the correct practice in respect to new trials and appeals, in hopes that at no distant day a practice conforming in some degree to the spirit of our Practice Act may be attained. The general system prescribed seems to us to be simple, and we can see no reason for a practice so loose and diverse, as appears to prevail in many portions of the State.

Upon the judgment roll we find no error. The facts found are fully sufficient to support the judgment. It must, therefore, be affirmed.

Upon the second branch of the appeal, the question is, as to the power of the Court to extend the time to give notice of intention to move for a new trial. Due notice of the filing of the findings was given to appellant's counsel on the 18th of January, 1864. On the next day—January 19th—on application of appellant's counsel, made in open Court, in presence of defendant's counsel, the Court entered an order providing—among other things—that plaintiffs “have thirty days from date to prepare, serve and file the notice of motion to move for a new trial.” This order, therefore, extends the time for serving and filing notice of motion till the 18th of February. On the 17th of February—within the time—the notice was served. The statement was served on the 20th, and filed on the 24th of the same month.

Section one hundred and ninety-five of the Practice Act, as amended in 1861, provides, that “The party intending to move for a new trial shall give notice of the same * * where the action has been tried by the Court, * * within ten days after receiving written notice of the filing of the findings of the Judge.” (Laws 1861, page 590, Sec.1.)

Section two of the same Act amends section five hundred and thirty of the Practice Act, relating to the time within

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which an act is to be done, whereby it is — among other things — provided, that “When the act to be done relates to the pleadings in the action * * * or the service of notices other than of appeals, or the preparation of statements, or bill of exceptions or of amendments thereto, the time allowed by this Act may be extended upon good cause shown by the Court in which the action is pending; * * * but such extension shall not exceed thirty days beyond the time prescribed by this Act without the consent of the adverse party.” (Ib., page 591, Section 2.)

These two amendments were made by the same Act. Section one hundred and ninety-five, as thus amended, gives the party, as an absolute right, ten days after receiving written notice of the filing of the findings by the Court, within which to serve his notice of intention to move for a new trial. And section five hundred and thirty authorizes the Court, upon good cause shown, to extend “the time allowed by this Act” for “the service of notices *other than of appeal*,” provided that “such extension shall not exceed thirty days.” There can be no doubt that this provision covers notices of intention to move for a new trial. “The time allowed by this Act” for “the service of notices” may be extended, and a special exception is made of notices “of appeal” only. *Expressio unius est exclusio alterius*. We can see no good reason, we confess, why this authority to extend the time for giving notice of intention to move for a new trial should be given, for it would in most, if not in all cases, be less trouble and inconvenience to give the notice than to procure an extension of time. But there can be no doubt that the power is given. Section one hundred and ninety-five was again amended in 1863, but in no respect affecting the question under consideration. Section five hundred and thirty has not been amended or expressly repealed. As it was not repugnant to section one hundred and ninety-five of the Act of 1861, it is not repugnant to that section as amended in 1863, and is, therefore, still in force. It follows that the Court did not exceed its authority in extending the time.

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The law itself gave plaintiffs five days within which to file statement, after the service of notice of intention to move. On the 19th, before the expiration of five days after the service of notice, defendants' counsel stipulated, that plaintiff might have ten days from the 19th to prepare and file statement, reserving the right, however, to raise the objection that the lawful time had already expired. The statement was filed within this time. As, according to these views, the time for filing statement had not then expired, it follows that the subsequent filing was in time, and that the order dismissing plaintiffs' motion for new trial is erroneous and must be reversed.

In order to guard against a misconstruction of our opinion, we deem it proper to state here, that, we do not intend to be understood as intimating that the Court has authority under section five hundred and thirty to extend the time for filing statements on motion for new trial thirty days after giving the notice. The general terms of the section are, perhaps, broad enough to bear that construction, if that section contained the only restriction upon the subject; but it does not. Section one hundred and ninety-five, as amended in 1861, and also as amended in 1863, gives the party five days after giving notice as an absolute right within which to file statement, and then adds, "or within such further time, *not exceeding twenty days*, as the Court or Judge thereof may by order grant," etc. This is an express limitation as to the power of the Court, or Judge, in a section relating exclusively to a motion for new trial, and must prevail rather than the general provision in section five hundred and thirty. The general provision in section five hundred and thirty would have effect by referring it to statements on appeals, the exception in that section being limited to notices of appeal, and the reason of that exception, doubtless, was, that to allow an extension of time to file a notice of appeal would be virtually to allow the Court the power to extend the time for taking an appeal.

As to the third branch of the appeal, the judgment was entered on the 13th day of January, 1864. No statement on appeal was filed or served till the 12th and 15th of April, and

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no order or stipulation for an extension of time was obtained. More than twenty days after the entry of judgment having elapsed before the filing of the statement, the plaintiffs must "be deemed to have waived their right thereto," under section three hundred and thirty-nine of the Practice Act. There was then no error in striking out the statement, and the order must be affirmed.

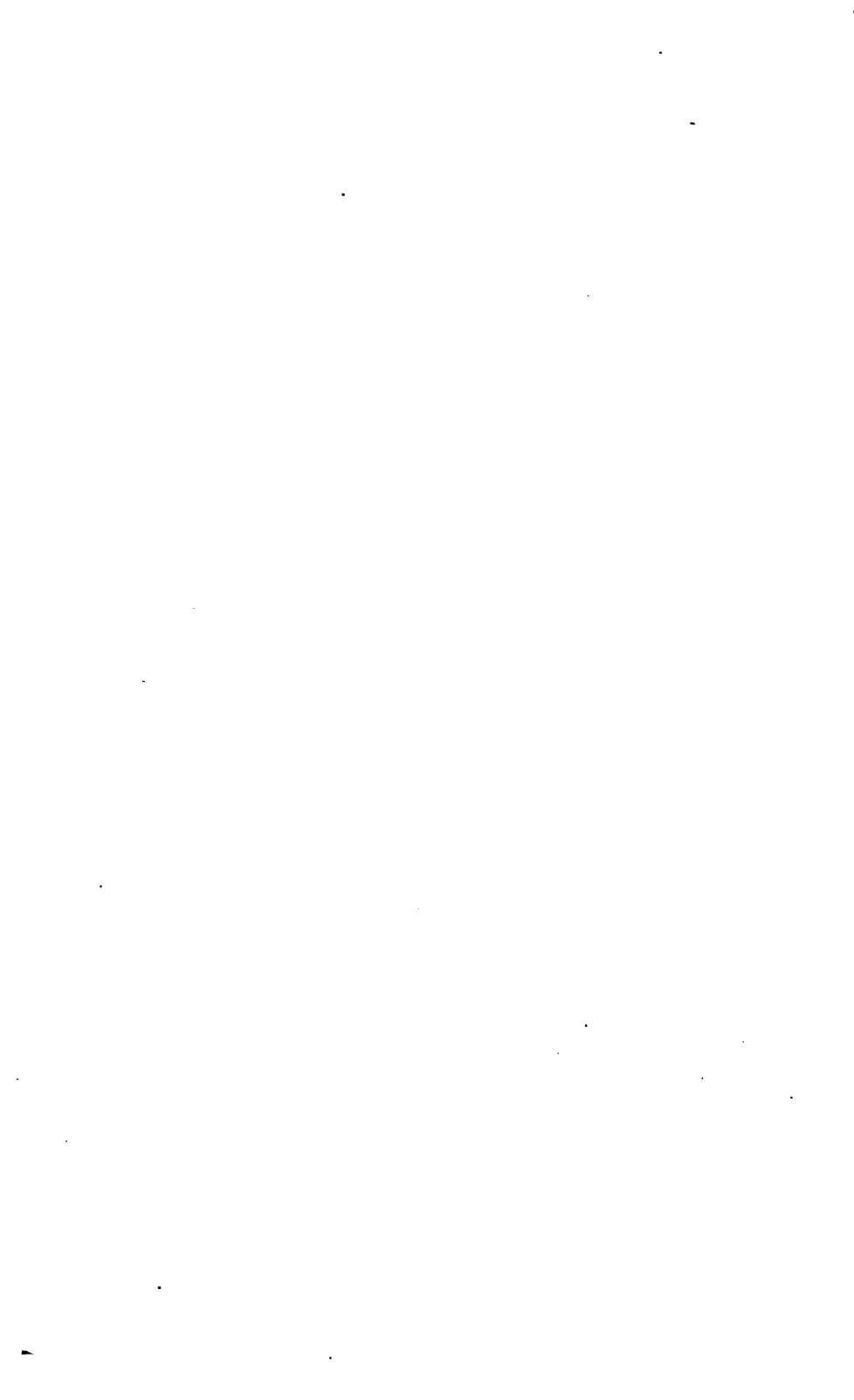
The only papers necessary to bring up for the purposes of the second appeal, were, the affidavit of Minor, notice, exhibits A, B, C, affidavit of Hart, order dismissing the motion, and exception thereon, extending from folio nine hundred and ten to nine hundred and thirty-nine, inclusive. These presented the entire question. There was no occasion to bring up the statement itself, as the only question, was, not as to *the sufficiency or character of the statement*, but as to whether or not *it was filed in time*.

It is ordered that the judgment appealed from be affirmed; that the order dismissing plaintiffs' motion for a new trial, dated April 5, 1864, be reversed, and the cause be remanded for further proceedings on the motion for new trial; and that the order striking from the files of the Court plaintiffs' statement on appeal made April 26, 1864, be affirmed. And it is further ordered that plaintiffs recover their costs of the order reversed, including the costs incurred for that portion of the transcript relating to the appeal from said order dismissing motion for new trial in the foregoing opinion specified, and extending from folio nine hundred and ten to folio nine hundred and thirty-nine, inclusive, and no more; and that the several parties pay their own costs accruing in this Court.

Mr. Justice RHODES, having been of counsel, did not participate in the decision of this case.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
JANUARY TERM, 1865.

THOMAS W. MILLARD *v.* CHARLES W. HATHAWAY,
AND EDMUND V. HATHAWAY.

APPEAL FROM JUDGMENT.—On an appeal from a judgment, if no errors are assigned in the record, the appellate Court will only review the judgment roll.

WAIVER OF FAILURE TO FILE STATEMENT AND SERVE NOTICE.—If the order denying a motion for a new trial states that the motion was submitted upon the statement and affidavits by consent of the respective attorneys, the respondent is precluded in the appellate Court from saying that the statement was not filed in time, or that the notice of intention to move for a new trial was not filed or served.

WHEN TRUST CREATED, AND HOW.—When, on the purchase of property, the conveyance of the legal estate is taken in the name of one person, while the consideration is given or paid by another, a resulting or presumptive trust immediately arises, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds.

PLEADINGS, FINDINGS, AND JUDGMENT.—If the findings of fact follow the issues raised by the pleadings, and a demurrer would not be sustained to the complaint, the judgment will not be arrested upon the findings.

FINDINGS OF THE COURT.—The findings of a Court cannot be altogether detached from each other and considered separately. If a particular finding be doubtful or obscure, reference may be had to the others to ascertain its true meaning.

IMPLIED TRUST — PROOF OF.—The facts constituting an implied trust can be proved by parol testimony.

Statement of Facts.

RECITAL IN A DEED.—The recital in a deed that the purchase money of the property thereby conveyed was paid by the grantee, is not conclusive that such was the fact in an action brought by an alleged *cestui que trust* against the grantee as trustee to establish the trust. The recital may be explained or contradicted by parol testimony.

PROOFS IN ACTION TO ESTABLISH IMPLIED TRUST.—In an action brought to establish an implied trust, on the ground that the deed was executed to one party and the purchase money furnished by another, the party alleging the implied trust must prove clearly that the money belonged to him; and if the testimony is merely parol, it will be received with great caution.

STIPULATION OF *Cestui Que* TO REPAY MONEY TO TRUSTEE.—Where one pays the purchase money, and the deed is executed to another, the law implies a trust, to be executed by a conveyance to the *cestui que*, on demand; and this implied trust is not destroyed because the beneficiary stipulates, in writing, to repay the money, with interest, until paid; and the trust is not to be executed until the money is paid.

PROOF OF RELEASE OF EQUITABLE ESTATE IN LAND.—A release of an equitable estate in land can only be proved by a deed or conveyance, in writing, subscribed by the party granting the same, or by his lawful agent thereunto authorized by writing.

STATUTE OF LIMITATIONS IN CASES OF TRUSTS.—If one holds the legal title to land in trust for another, and there is a stipulation that the trustee shall deed the land to the beneficiary upon the payment of the purchase money and interest to the trustee, a cause of action does not accrue to compel the execution of the trust until the money is paid, nor does the Statute of Limitations commence running until this time.

VOLUNTARY ACCEPTANCE OF MONEY DUE TRUSTEE AFTER IT HAS BEEN DUE FOUR YEARS.—If one holds the legal title to land as security for a sum of money due him by the one having the equitable estate, although the trustee, after the lapse of four years from the time the money falls due, cannot be compelled to accept the money and execute a conveyance, yet, if he voluntarily receives the money when tendered, he is not discharged by the Statute of Limitations from executing the trust and giving a deed to the beneficiary.

APPEAL from the District Court, Third Judicial District, Alameda County.

The Court below found the following facts:

1. That in the year 1855, the plaintiff, for the joint and equal benefit of himself and one Joseph Scott, and one Theodore H. Scribner, negotiated for and purchased of Fulgencio Higuera and Celia Feliz de Higuera, his wife, the tract of land in said complaint referred to, situate in the county and State aforesaid, for the agreed sum and price of eight thousand dollars; the same being part of the Agua Caliente Rancho, then and there the property of said Higuera and wife, and estimated to contain two thousand seven hundred acres; but the actual

Statement of Facts.

quantity, on survey, was two thousand eight hundred and three acres.

2. That being unable to pay said sum of eight thousand dollars, plaintiff applied to defendant, Charles W. Hathaway, and requested him to lend him the money to complete the purchase, which said Hathaway agreed to do.

3. That thereupon the purchase was concluded, and for security for the said sum so loaned, the deed from said Higuera and wife for the said land was made directly to said Hathaway, and it was expressly agreed by parol that said Hathaway should hold the same until said sum of eight thousand dollars was repaid, and should then convey the land to said plaintiff, Scribner and Scott; and in pursuance thereof, said Hathaway did loan and advance said eight thousand dollars on the terms aforesaid, on the 25th day of August, A. D. 1855, and on the same day did take and receive a deed of that date, duly executed and acknowledged by said Higuera and wife, to himself for said land.

4. That all the negotiations in relation to the purchase of said property were had and made by plaintiff, and that said Hathaway knew nothing about them and had nothing to do with them, except that at the request of plaintiff he paid the money and received the deed as above stated, and thereafter plaintiff, and said Scott and Scribner, entered into the possession of said land and occupied and cultivated the same.

5. That said purchase was made for the joint benefit of said plaintiff, Scott and Scribner; they, said Scott and Scribner, to have one third part each of said premises upon payment of their proportionable part of the consideration therefor to said Hathaway, to apply in reduction of said loan; in pursuance whereof a survey was made of said land, and the same was divided into three equal parts; and the said Hathaway, in pursuance of his agreement with said Scott and Scribner, did, by deed dated on the 13th day of October, 1855, convey to said Scott the southerly one third part of said lands as divided, the same being nine hundred and thirty-four and sixty-seven one-hundredths acres; that in like manner, and in fulfilment

Statement of Facts.

of his agreement with said Scribner, said Hathaway did, by deed dated December 15, 1855, convey to said Scribner one third part of said land, viz: nine hundred and thirty-four and sixty-seven one-hundredths acres.

6. That the remaining nine hundred and thirty-four and sixty-seven one-hundredths acres was set off to plaintiff on a partition thereof theretofore made between him and said Scribner, the same being in two parcels, viz.: two hundred and thirty-one and fifty-three one-hundredths acres was set off to him from the northerly end of said tract, and was bounded southerly by the share so conveyed to Scribner as aforesaid, and that the residue of one third, being four hundred and three and fourteen one-hundredths acres, was set off to plaintiff between the two shares of Scott and Scribner.

7. That the said plaintiff immediately after said purchase entered into possession of the parcels so set off to him, and cultivated and controlled the same, and still resides upon said parcel of five hundred and thirty-one and fifty-three one hundredths acres.

8. That in the year 1861 plaintiff negotiated the sale of said four hundred and three and fourteen one-hundredths acres to one Valpy, and in pursuance thereof defendant Edmund V. Hathaway conveyed the same by deed to said Valpy for the sum of six thousand five hundred dollars, paid by said Valpy to him on March 5th, 1861, and which sum was received by said defendant upon the money so advanced and loaned for the purchase thereof and for the interest therein, and that afterwards and before the commencement of this action the whole of the one third remaining unpaid of the said eight thousand five hundred dollars, with interest thereon from August 25, 1855, at the rate of three per cent per month, had been paid to said defendant E. V. Hathaway; the other two thirds thereof, with interest, having been before paid by said Scott and Scribner, as hereinbefore stated.

9. That said defendant, Edmund V. Hathaway, took the conveyance of said land from Charles W. Hathaway, with full

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knowledge of the trust, and without any consideration by him paid.

10. That more than four years have not elapsed since any cause of action has accrued against said defendants, on the agreement with defendants for the conveyance of said land.

11. That said contract to reconvey said land to plaintiff remains yet in full force and effect, and never has been cancelled, abrogated or impaired by any subsequent contract or agreement between plaintiff and defendant, or either of them, and that no sum is due from plaintiff to defendants, or either of them, on account of any money or property advanced to him by them, or either of them.

12. And as a conclusion of law, the Court finds and determines that the said plaintiff is entitled to a conveyance from defendant, Edmund V. Hathaway, in whom the legal title of said tract of five hundred and thirty-one and fifty-three one-hundredths acres is now vested of said tract of land, as the same is particularly described by metes and bounds in the complaint, and a decree of this Court is ordered to be entered accordingly.

The other facts are stated in the opinion of the Court.

John T. Doyle, and W. W. Crane, Jr., for Appellant.

Did or did not the facts in law constitute a loan from Hathaway to Millard and his associates? This is purely a legal question; and as a legal question, does it admit of serious doubt or argument? Millard applied for what, in popular phraseology, he terms a loan. What he really wants is to find a man to advance the necessary sum to make the purchase of which he is to have the benefit. While yet *in fieri*, it is talked of between the parties as a loan—but that does not make it such. The legal character of the transaction does not depend on the preliminary negotiations, or the language employed in them, but on the actual contract into which they ultimately merged and were absorbed.

That contract was all put in writing. It consisted of the deed from Higuera to Hathaway, which conveyed the land,

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and the agreement, Exhibit No. 1, signed by Millard, Scott, and Scribner, reciting that he had purchased and paid for it in his own name, but for their account, and promising repayment. To vary it by parol, was of course incompetent for either of the parties. It expresses, of necessity, the truth, and the whole truth about the matter. And it expresses, as clearly as language can, money paid, laid out, and expended by Hathaway, to and for the use of Millard and his companions, and at their request.

If Hathaway had sued them for the money, he should have sued for money paid, laid out, and expended. (Comyn on Contracts, 4th Am. edit. p. 451.) If Higuera, after receiving the money, had declined delivering the deed, Hathaway, not Millard, could have recovered it back from him as money had and received. If, before paying the money to Higuera, it had been stolen from Hathaway, he would have had no claim for it against Millard, Scott, and Scribner, for he brought them under no obligation to him till he had actually paid for the land for their account. And in such case an indictment against the thief would necessarily have charged the money as Hathaway's money.

It is plain, therefore, that there was no loan from Hathaway to Millard, Scott, and Scribner, and hence that it was Hathaway's money, not theirs, which paid for the land. In a word, the distinct declaration in the written contract, Exhibit No. 1, that Hathaway *had purchased the land and paid the money to Higuera for the account of Millard, Scott, and Scribner*, precludes them in any action (save a bill in equity to reform the contract) from giving any parol evidence to vary or explain it. When one man purchases and pays for land, and takes the title in the name of another, the law ordinarily implies a trust for the benefit of the one who purchased and paid, *because it presumes such to have been the intent of the parties*. But if their actual intent is shown to have been different, the presumption is destroyed, and no trust is then to be implied. (*Sidmouth v. Sidmouth*, 2 Beavan, 447; *Scawin v. Scawin*, 1 Young & Collyer, 65.)

An express contract being proved, the law will not raise any implied one, for that would be to presume against the fact as proved. *Expressum facit cessare tacitum.* (Broom's Legal Maxims, Am. Ed. 414.)

Now, in this case the proof was perfectly conclusive and uncontradicted; it is found by the Judge below, and is, in fact, the very corner stone of the plaintiff's whole case, that C. W. Hathaway was not to convey to Millard, Scott, and Scribner, until he had been repaid his purchase money. He made the purchase and payment "for their account" and benefit, and took the title, not on any implied trust for them, but on an express parol contract that he was to hold it on his own security. It is not claimed or pretended that he was under any obligation to convey till his advance was repaid him.

In conclusion, then, the trust which the plaintiff has here attempted to set up, is one required by the Statute of Frauds to be evidenced by the deed of the parties creating or declaring the trust. It is not a trust implied by law, for it rests on no implication whatever, but on the *express* contract of the parties. Such a contract is not only within the letter of the statute, but most obviously within the very mischief intended to be prevented by it.

But supposing C. W. Hathaway took a trust estate in the land for the benefit of Millard, there is an insuperable objection to the plaintiff's recovery in the plea of the Statute of Limitations.

It must be borne in mind that the object of the action is to compel E. V. Hathaway to convey the land on the ground that he took the title from C. W. Hathaway with notice of the trust. The plaintiff claims that E. V. Hathaway paid nothing for the land, and had notice of the trust. He, on the other hand, insists that he paid a valuable consideration for it, and that there was no trust in fact, so that it was not possible he could have notice of it.

The truth appears to be, that E. V. Hathaway paid C. W. Hathaway forty-five thousand dollars for his business, including his claim against the Millards and this land, and that he

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had actual notice of the original transaction with Millard, Scott and Scribner, whatever it was. If it created a resulting trust, he took the land with notice of the facts from which that trust resulted. We assume then, for the purposes of this branch of the argument, that the original transaction gave rise to a trust. E. V. Hathaway has bought the land from the trustee with notice of the trust. He can be charged as a trustee by the plaintiff, but it is of necessity *in invitum*. It is not a trust resting in contract either express or implied, but arises purely and simply by *operation of law* and against the will of the trustee. In such case the Statute of Limitations begins to run from the moment of conveyance to E. V. Hathaway. (*Murdock v. Hughes*, 7 Smedes & Marshall, 219; *Williams v. The First Presbyterian Society of Cincinnati*, 1 Ohio, 488.)

A. M. Crane, and Edward Tompkins, for Respondents.

In October, 1861, Hathaway held as a mere naked trustee. Every dollar of his loan, principal and interest, had been repaid. Millard owned the entire land. Hathaway's mortgage had been paid off, and he held the bare naked legal title. Millard had the whole interest in the land. It was his in equity, wholly and entirely.

Could his estate or interest in this land be conveyed or surrendered by parol, without writing? The sixth section of our Statute of Frauds (Wood's Dig. 106) would seem to be conclusive that it could not be done.

Plaintiff had a trust estate in the land, comprising its entire value. The words of the statute are very plain, viz.: "Nor any *trust* or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, *surrendered*, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party," etc.

It is argued by appellants that this trust, being created without writing, may be cancelled or surrendered in the same manner in which it was created. This we admit. But the trust was created by the "act or operation of law." Millard paid

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the purchase money, and Hathaway took the deed. Upon these facts the "operation of law" raised the resulting trust. This trust could no doubt be cancelled or "surrendered" in the same manner, *i. e.*, "by act or operation of law"—namely, Millard's trust estate might be extinguished or passed to another by judicial sale of his interest. This would be by act of law.

Again: If Millard had stood by when C. W. Hathaway conveyed to E. V. Hathaway, and stated that he had no interest in or claim to the land, in such case his trust estate would have stood extinguished by estoppel.

Again: In case of Millard's death, intestate, the trust would "by operation of law," have passed to his heirs.

In these various ways, and others which might be named, the trust could be extinguished, assigned, or surrendered, "by act or operation of law." But we utterly deny the proposition that the trust could be surrendered by a parol contract—the land all the time, and even until now, remaining in the full and entire possession of the plaintiff. This trust could no more be conveyed by mere word of mouth than could a fee simple or freehold interest in the lands. It occupies the same dignity, and is classed in the same category, by statute, with those interests.

But, as if to clinch the matter and close all question as to the meaning of the sixth section above quoted, we have section twenty-five, (Wood's Digest, 108,) which defines the terms before used, and the enactment is "the terms 'estate and interest in lands,' shall be construed to embrace every estate and interest, present and future, vested and contingent."

The Court below, in its opinion, after showing how the loan had been repaid in 1861, says: "These payments satisfied in full the obligation of Thomas Millard, and from that time he was entitled to a conveyance." This is common sense as well as law. (*Sherwood v. Dunbar*, 6 Cal. 25.)

"Such trusts as are cognizable, and can only be enforced in equity, (our case) cannot, so long as they subsist, as between

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trustee and *cestui que trust*, be reached by the Statute of Limitations." (Angell on Limitations, 161; *Kane v. Bloodgood*, 7 Johns. Ch. R. 90.) "In general, lapse of time is no bar to a trust clearly established to have once existed." (*Prevost v. Gratz*, 6 Wheat. 481.) "But if the trustee denies the right of his *cestui que trust*, and the possession of the property becomes adverse, lapse of time from that period may constitute a bar in equity." (7 Johns. Ch. R. 90.) "But it must be shown that an open denial of the existence of the trust has been brought home to plaintiff." (Angell on Limitations, 172, Sec. 9, last clause.)

To apply these principles to this case. So far from showing any denial of the trust on the part of defendants, we only propose to refer to a leading case, decided by Chancellor Kent nearly half a century ago, for the purpose of showing how entirely like, in its leading facts, that case was to this. We refer to *Boyd v. McLean*, 1 Johns. Ch. R. 582.

In that case, the Boyds contracted to buy the land of one Colden; in this case, plaintiff, Scott, and Scribner, contracted to buy of Higuera. In that case, the Boyds borrowed one thousand five hundred dollars of McLean to pay for the land; in this case, plaintiff and his associates borrowed eight thousand five hundred dollars of Hathaway for the same purpose. In that case, the deed was made directly from Colden, the vendor, to McLean, the money lender; in this case, the deed was made directly from Higuera, the vendor, to Hathaway, the money lender.

In that case, as in this, the defendant denied in his answer that he ever made any loan to plaintiff to enable him to pay for the land, but sets up, as in this case, that he bought the land with his own money, and on his own account, and that the deed to him was absolute, and not by way of security. The answer of defendant in that case, like that of E. V. Hathaway in this, (and the coincidence is remarkable,) sets up that about the time of the purchase he did make a verbal parol agreement with plaintiffs to sell them the land upon payment of one thousand five hundred dollars, and interest, in two

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years. In that case, as in this, the plaintiffs were in possession, and, as in this case, the answer sets up the Statute of Frauds. It perhaps would not be possible to find any two cases in all the reports more exactly resembling each other in all their leading facts.

Chancellor Kent decreed an accounting and conveyance. We cite, also, the following authorities: *Bottsford v. Burr*, 2 Johns. Ch. R. 582; *Livingston v. Livingston*, Id. 409; 2 Story's Eq. Juris. 1,201; *Osborn v. Endicott*, 6 Cal. 153; *Foot v. Colvin*, 3 J. R. 216; *Simson v. Eckstein*, 22 Cal. 580; *Bayless v. Baxter*, 22 Cal. 575.

The appellants, in their brief, appear to lay great stress upon the point that because there was a parol contract *defining the conditions of the trust*, or the *terms* upon which Hathaway was to convey the land, (*i. e.*, on the repayment of the loan and interest,) that, therefore, the transaction loses its character of an implied trust, and becomes an express trust, resting in parol, and hence void by statute.

But this case of *Boyd v. McLean* is a full answer to this objection also. On reading the case, it will be seen that the condition of the trust was that Boyd should repay the one thousand five hundred dollars, and interest, in four years, upon which the land was to be conveyed to him; *and this condition or agreement rested entirely in parol*. And also in the case of *Bayless v. Baxter*, 22 Cal. 580, above quoted, it was argued by counsel for appellants that because there was a verbal contract to reconvey, that therefore there could be no *implied* or resulting trust. In reply to this, Mr. Justice Crocker (Cope and Norton concurring) says: "The fact that defendant agreed by parol to do what the law would compel him to do, (*i. e.*, hold the title subject to the rights of the plaintiff, and convey to them on demand after a certain time,) makes the trust none the less a trust created by operation of law." The principle of both these cases is, that when a resulting or implied trust has been created, the *conditions* or *agreement* upon which the trust is to be executed may be shown by parol. (4 J. J. Marsh. 593.)

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By the Court, SHAFER, J.

This action is brought to compel a conveyance of certain real estate, and for an account.

The complaint charges: "That in the year 1855 the plaintiff purchased of Fulgencio Higuera, and Celia Feliz de Higuera, his wife, a certain tract of land in the County of Alameda, and State of California, for the sum of eight thousand dollars. That the same was a part of the rancho known as the Agua Caliente Ranch, and was then the property of said Higuera and wife. That it was called two thousand seven hundred acres, but was defined by metes and bounds, set forth in the deed hereinafter mentioned, and actually contained about two thousand eight hundred and three acres. That plaintiff being unable to pay the sum of eight thousand dollars at the time himself, applied to the defendant, Charles W. Hathaway, then and since a resident of San Francisco, and requested him to lend the money to complete said purchase, which Hathaway agreed to do. That thereupon said purchase was concluded, and for the security of the said sum so loaned, and for no other purpose whatever, the deed from Higuera and wife for the said land was made directly to said Hathaway, and it was expressly agreed between him and said Hathaway that said Hathaway should hold the same until the said sum of eight thousand dollars was repaid, and that then he should convey the said land to the plaintiff. That the said deed to said Hathaway from said Higuera and wife was dated August 25, 1855, was duly acknowledged by them, and was recorded, at the request of the plaintiff, in Alameda County, on the 29th of August, 1855, in Liber D of Deeds, page 597, to which deed, or to a certified copy thereof, the plaintiff, for greater certainty, begs leave to refer. That all the negotiations in relation to the purchase of said property were had and made by the plaintiff. That said Hathaway knew nothing about them and had nothing to do with them, except that, at the request of the plaintiff, he paid the money and received the deed, as above stated. That plaintiff alone took charge of said land, except as is here-

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inafter stated, and directed and controlled the same as the owner thereof. That said Hathaway did not interfere therewith, and that it was a matter of general notoriety, and well and publicly understood, that said plaintiff had become the owner of said premises; that about the time of making the said purchase the plaintiff agreed with Joseph Scott and Theodore H. Scribner that they might each share in the same to the extent of the one third part of said premises, they paying the consideration therefor to said Hathaway, to apply in the reduction of said loan; that he requested said Hathaway to convey to them the portions purchased by them; that a survey was made of said land, and the same was divided into equal parts, and the said Hathaway, at the request of plaintiff, and in fulfilment of his agreement with Scott and Scribner, did, by deed bearing date on the 13th of October, 1855, convey to said Scott the southerly one third of said land, so divided as aforesaid, the same being nine hundred and thirty-four and sixty-seven one-hundredths acres, more or less; that said deed was duly acknowledged by said Hathaway, and recorded in Alameda County, to which deed, for greater certainty, plaintiff refers; that in like manner, and at plaintiff's request, and in fulfilment of his agreement with said Scribner, said Hathaway did, by deed bearing date December 15, 1855, convey to said Scribner the one third part of said land; that on such partition was assigned to him, the same being also nine hundred and thirty-four and sixty-seven one-hundredths acres, more or less; that said deed was duly acknowledged and recorded — to which deed plaintiff refers; that the remaining nine hundred and thirty-four and sixty-seven one-hundredths acres was set off to the plaintiff on such partition; that the same was in two parcels; that five hundred and thirty-one and sixty-three one-hundredths acres was set off to the plaintiff from the northerly end of said tract, and was bounded southerly by the share so conveyed to Scribner as aforesaid, and the residue of one third, being four hundred and three and fourteen one-hundredths acres, was set off to the plaintiff between the two shares that were conveyed to Scott

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and Scribner as aforesaid, and the two parcels — making together nine hundred and thirty-four and sixty-seven one-hundredths acres; that the plaintiff entered into possession thereof, and from that time to the commencement of this action has cultivated, occupied and enjoyed by himself or his tenants, the whole of the said northerly parcel of five hundred and thirty-one and sixty-three one-hundredths acres, and also the whole of the said four hundred and three and fourteen one-hundredths acres, until the same was sold by him, as is hereinafter stated. The said plaintiff further shows that the defendant, Edmund V. Hathaway, is the brother of and is and for many years has been, the partner in business of the said Charles W. Hathaway; that some time in the latter part of 1856, or early in 1857, said Charles proposed to leave the State of California and to be absent for a considerable time in the Eastern States; that he stated to the plaintiff that his absence might occasion inconvenience, in consequence of the title to the property being in him, and that to obviate the same, and to put it in a situation so that the same could be conveyed to the plaintiff in case he should wish to pay the balance of said original loan, then unpaid, he proposed to convey, and did convey to the said Edmund V. Hathaway, the said two parcels of land, so as aforesaid in said partition assigned to the plaintiff; that the deed thereof bears date on the 18th of November, 1856, and was recorded in said County of Alameda; that said Edmund well knew, at the time the said deed was given, that the title to said land was held by his brother in trust for the plaintiff; that no consideration was paid by him to said Charles therefor, to the knowledge or belief of the plaintiff; and the same was thenceforward held by him in the same manner, as it had before been held by the said Charles W. Hathaway, and the plaintiff remained in the possession and enjoyment of said premises in the same manner as he had been before said deed was given.

The said plaintiff further shows, that shortly prior to the 5th of March, 1861, he sold to Calvin Valpy the southerly parcel of said land, so as aforesaid assigned to him on the divi-

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sion of the said property, containing four hundred and three and fourteen one-hundredths acres. That such sale was made by this plaintiff without any action or agency therein by said defendants or either of them. That at the request of the plaintiff, said Edmund V. Hathaway conveyed the same to said Valpy, by deed dated March 5, 1861, and recorded in Alameda County, to which the said plaintiff refers.

The said plaintiff further shows that all the consideration for the said sales to Scott, Scribner and Valpy, have been received by the said defendants, or by one of them. That the same amounts to much more than the eight thousand dollars originally loaned. That in addition thereto, one Richard Threfal, in or about the years 1860 and 1861, paid in to the defendants for account of plaintiff, different sums of money, amounting in the aggregate to over two thousand dollars. The plaintiff has trusted entirely to the said defendants to keep the accounts between them, and that he is therefore unable to state the precise sums that they have received from the said Scott, Scribner, Valpy and Threfal. That he has endeavored to obtain from them a statement of said accounts, but has been unable to do so, but he believes and charges the truth to be that they have been fully repaid the loan so made to him as aforesaid, and that the said account, if properly and justly made up, would show a large balance in his favor.

The said plaintiff further shows that the title to the remaining five hundred and thirty-one and sixty-three one-hundredths acres yet remains in the said defendants or one of them. That this plaintiff is yet in the full possession thereof, and that the following is a full description thereof according to the survey made at the time said land was divided as hereinbefore stated. [Description omitted.]

That the said plaintiff further shows that until within a few months he had well hoped that the defendants would give him a statement of said account, and would convey to him the said five hundred and thirty-one and sixty-three one-hundredths acres, as in justice and right they ought to do. That he has requested to have said account and to have said five hundred

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and thirty-one and sixty-three one-hundredths acres conveyed to him, and has offered and is now ready, in case the said account, when correctly made, shall show that any sum whatever is due from him to the defendants or either of them, upon the said loan for which the said land was conveyed as security as aforesaid, to pay the same. That said account has not been furnished him, and they have required from him the payment of the sum of fifteen thousand dollars as a condition precedent to the conveyance of said property to him. That no such sum, and as he is advised and believes no sums whatever remain unpaid of said loan, or is due from him to the defendants or either of them. That the said claim and the refusal to convey without the payment thereof, are inequitable and unjust, and a violation of the trust under which said land was conveyed to defendants as above stated. That said land has now become of the value of fifteen thousand dollars and upwards, and that said Edmund V. Hathaway, as plaintiff is informed and believes, has recently declared his intention to move on to the said land and to take possession thereof, and thus to exclude this plaintiff therefrom, and has pretended that the same belongs to him and that plaintiff has no right to the same, and that plaintiff is fearful that he will attempt to deprive him of his interest in the said property unless prevented by the interposition of this Court.

Wherefore the said plaintiff demands for relief in this action:

First—That an account may be taken of said loan, and of the sums that have been received by the said defendants or either of them, from or on account of the said land, and particularly of the sums that have been received from the said Scott, Scribner, Valpy and Threfal, or any or either of them, and the balance thereof, and to whom the same is due may be ascertained and declared.

Second—That the said defendants and each of them may be decreed to convey the said five hundred and thirty-one and sixty-three one-hundredths acres of land by a good and sufficient deed to the plaintiff, free and clear from any liens or incumbrances thereon, if any such there be, that have been

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caused or permitted by them, or either of them. In case it shall be ascertained that any part of such loan is yet due or unpaid by the plaintiff, such conveyance to be conditioned upon the payment thereof by the plaintiff. If the same shall be found to have been paid in full, then such decree to be absolute.

Third — That any balance found due the plaintiff upon such accounting may be ordered to be paid to him, and that he may have judgment therefor against the said defendants, or either of them, as shall be just.

Fourth — That he may have such other or further decree or relief herein as shall be agreeable to equity, with costs.

The defendants answered severally, denying all the allegations of the complaint, though they admit the plaintiff to be in possession of about twenty acres in the northeast portion of the tract.

For further and separate answer the defendants allege that the purchase from Higuera and wife was made by Charles W. Hathaway for eight thousand dollars, and that the purchase money was paid by him. That at the date of the purchase, and for a long time prior thereto, the plaintiff and his brother, Stephen W. Millard, were jointly indebted to said Hathaway in the sum of seven thousand five hundred dollars cash advances, and that he thereafter, at the request of the two brothers, agreed with them verbally, but without consideration, that whenever they paid him what they owed him (seven thousand five hundred dollars,) and also one third of the purchase money of the land paid Higuera, and also any further advances which said Hathaway might thereafter make to the said Millards, with interest on said several sums at the rate of two per cent per month, payable monthly, and if not so paid then to compound, that he would convey to them one third of the premises in controversy. That at the same time said Hathaway agreed verbally with Scott and Scribner to convey to them certain portions of the premises, amounting to about two thirds thereof, upon payment of a certain stipulated price therefor, and that said Hathaway, upon payment of the price so agreed

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upon, duly conveyed such portions to said Scribner and Scott; but no agreement was ever had between plaintiff and said Hathaway that the sums of money so received should be applied in the reduction of the joint indebtedness of the Millards to him or towards the purchase price of said lands. That the Millards were let into possession of about one third of the premises upon a verbal agreement that they should pay said Hathaway interest upon the amount of said indebtedness (seven thousand five hundred dollars,) and upon one third of the sum of eight thousand dollars, and upon further advances in manner aforesaid. That the Millards continued to occupy under said agreement. That on the 18th of November, 1856, said C. W. Hathaway conveyed said lands to said E. V. Hathaway for ten thousand dollars paid, less what had been previously deeded to Scott and Scribner. That between the time of said verbal agreement and the conveyance to E. V. Hathaway, said C. W. Hathaway advanced large sums to the Millards and sold and delivered to them large amounts of goods, wares and merchandise, and at the time of the conveyance by C. W. to said E. V. Hathaway, the former assigned to the latter all the indebtedness due from the said Millards to the said assignor. That in January, 1860, Stephen W. Millard removed to Pajaro, and that the plaintiff at the same time abandoned all of the premises in controversy, except an orchard and a vineyard, containing about twenty acres, in the northeastern part of said tract. That immediately thereupon the said E. V. Hathaway leased the whole of the premises, except said twenty acres, to divers persons, and from year to year has leased the same, and collected and received the rents therefor. That the plaintiff herein continued in the occupation of said twenty acres until August, 1861, when he delivered the same to said E. V. Hathaway, and removed to Pajaro also, where he continued to reside until about the commencement of this action, when he returned and took forcible and unlawful possession from defendant, E. V. Hathaway, of said twenty acres. That at the time plaintiff removed to Pajaro an account was stated, in the premises, between him and said E. V. Hathaway,

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whereby there was found due said Hathaway the sum of forty-one thousand six hundred and eighty-seven dollars and twelve cents, ten thousand dollars whereof were cancelled by him, and in consideration thereof the plaintiff released the said Hathaway from the aforesaid verbal agreement with C. W. Hathaway, and of and from all claim, or right, title, or interest in said lands; that the sale to Valpy was made by E. V. Hathaway alone, and that the lands rented to Threfal were so rented on his behalf; that while said plaintiff was upon said premises the defendants forwarded to him monthly accounts, which were received by plaintiff and not objected to by him, and that they showed the aforesaid balance due to the said E. V. Hathaway.

In further answer, the defendants submit that the complaint states a trust created by parol only.

And again, they allege that the agreement set out in the complaint was but a parol agreement for the sale of lands, and is, for that reason, null and void. And they also plead that more than four years have elapsed since the making of the agreement, and since any cause of action accrued thereon.

The trial was by the Court. The finding was for the plaintiff on all the issues, and judgment was duly entered thereon. The appeal is from the judgment and from an order denying defendants' motion for a new trial.

First — As to the appeal from the judgment, it must be determined upon the judgment roll alone, and as no errors therein have been either assigned in the record or suggested in the argument, we must consider the judgment as free from objection.

Second — As to the appeal from the order overruling appellant's motion for a new trial.

1. Counsel for respondent insist that the document contained in the transcript purporting to be a statement on new trial, cannot be recognized by us; and the first reason assigned is, that the statement and the exhibits annexed thereto, do not appear or purport to have been filed in the Court below.

The statement on new trial was duly settled by the Judge,

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and the clerk certifies that the statement was filed, without, however, stating the time when. But the respondent is precluded from saying that the statement was not filed in time, for it appears by the order denying the motion for new trial that "the motion was submitted upon the foregoing statements and affidavits by consent of the respective attorneys herein." (*Reynolds v. Harris*, 14 Cal. 667; *Dickinson v. Van Horn*, 9 Cal. 207.)

It is further insisted that the transcript fails to show any order overruling the motion for a new trial. This objection is also founded upon a misapprehension of the effect of the clerk's certificate to the transcript.

It is further insisted that the notice of intention to move for a new trial does not appear ever to have been filed or served. This objection is met by the facts referred to in our answer to the first objection.

2. The motion for new trial, as appears by the statement, was made upon the ground: First, of irregularity in the proceedings; Second, accident and surprise; Third, newly discovered evidence; Fourth, insufficiency of the evidence to justify the findings, and that they are against law; Fifth, errors of law occurring at the trial and excepted to by the defendants. Under each of the last two heads, there is a specification of grounds, as required by the Act of 1864, and to them, or rather to such of them as counsel have relied upon in argument, our attention will be exclusively confined.

There are three questions raised by the appellants which relate to the case made by the plaintiff at the trial: First—What kind of trust did the plaintiff's evidence tend to prove? Second—Is the trust found by the Court identical with the one declared on and with the one which the evidence tended to prove? Third—Was that trust, and the fact that the plaintiff had discharged all his obligations under it so as to entitle himself to a deed, found upon legal and sufficient evidence?

The relation of trustee may be constituted not only by the express declaration of the parties but also by implication or

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construction of law. Trusts of this description are either implied, or presumed, from the supposed intention of the parties, and the nature of the transaction; when they are known as "resulting trusts;" or they are raised independently of any such intention, and forced on the conscience of the trustee by equitable construction, and the operation of law; and such are distinguished as "constructive trusts." (Sto. Eq. Juris., Sec. 1,195.) These trusts are expressly exempted from the operation of the Statute of Frauds. (Wood's Dig., p. 106, Sec. 6.) It is well settled as a general rule that when upon a purchase of property the conveyance of the legal estate is taken in the name of one person, while the consideration is given or paid by another, a resulting or presumptive trust immediately arises by virtue of the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds.

The complaint alleges, as the foundation of the trust upon which the plaintiff relies, that in the year 1855 he contracted with Higuera for the land in controversy for eight thousand dollars; that C. W. Hathaway, on being applied to, agreed to loan the plaintiff the money to enable him to complete the purchase; that Hathaway, "at plaintiff's request, paid the money," and by agreement took a conveyance from Higuera to himself, "as security for the sum so loaned." The evidence of the plaintiff tended to prove the purchase as alleged—the contract of loan alleged—that the money was counted out by Hathaway to one Smith, who had acted in the purchase from Higuera as the agent of both parties, and that Don Diego Forbes, "who had received the money from plaintiff, Scribner and Scott," jointly interested in the purchase and loan, paid it to the vendor in the presence of Smith, Scribner and Scott.

There is no substantial variance between the evidence and the complaint. The allegation is that the money was "loaned" to plaintiff, which imports that the contract to loan was fully executed by a delivery, in legal effect, of the money by Hathaway to the plaintiff; and the subsequent averment that Hathaway "paid the money to Higuera at plaintiff's request," is

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but an averment that after the relation of debtor and creditor had been established between the two, or contemporaneously therewith, that Hathaway performed the mere manual service of delivering the money to the vendor. Passing the question of variance, the facts of the transaction which the plaintiff's testimony tended to prove, were a loan of eight thousand dollars, consummated by a formal delivery of the money by the lender to the borrower, and a payment by him to the vendor of the land, he conveying the land to the lender of the money as security for the payment of the loan. These facts being assumed, or given, a trust resulted at once in favor of the plaintiff by implication of law, to be executed according to the stipulation of the parties. The evidence of the plaintiff went to the very facts upon which that class of trusts is raised. We do not think it important to examine the question at length upon authority, for upon the proofs of the plaintiff the case is plainly one of implied trust upon principle. In support of our conclusion, however, we cite *Boyd v. McLean et ux.* 1 John. Ch. 582. The facts of that case are, substantially, the facts of this, and there is a like resemblance between this and the case of *Page v. Page*, 8 N. H. 187, and of *Cameron v. Ward*, 8 Geo. 245.

We further consider that the findings follow the issues raised upon the complaint, and as a demurrer would not lie to the one, so judgment could not be arrested upon the other. It is urged that the findings contradict each other as to whose money paid for the land. The findings are not irreconcilable with each other on that point. It is true that the third finding states that Hathaway paid the money to Higuera, still, it is further found that it was after the eight thousand dollars had been "loaned" by Hathaway to the plaintiff on the security of the title. It is of no consequence, in our judgment, who paid—or, rather, who "paid over" the money to Higuera—so that the relation of lender and borrower arose between Hathaway and the plaintiff before the payment, or *eo instanti* it was made. The findings of a Court cannot be altogether detached from each other, and considered piece-

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meal. If a particular finding be doubtful or obscure, reference may be had to the context for the purpose of ascertaining the true meaning.

It is further urged that the finding of the trust was against law; and, first, for the reason that the finding was upon parol evidence; and, second, for the reason that it is against written evidence introduced, by which the plaintiff is estopped.

The question of whether the facts of an implied trust can be proved by parol, requires no discussion.

The written document referred to was executed on the same day as the deed from Higuera to Hathaway, and is as follows:

“SAN FRANCISCO, August 25, 1855.

“Whereas, Charles W. Hathaway has paid the sum of eight thousand dollars for the purchase of a piece of land, situated in Alameda County, and the satisfaction of a mortgage thereon, said land being known as the Augua Caliente Rancho, and has accepted our draft in favor of Henry C. Smith for five hundred dollars, said purchase, payment and acceptance being for the account of the undersigned, T. H. Scribner, Joseph Scott and T. W. Millard, jointly and severally interested one third each; now, therefore, we T. H. Scribner, Joseph Scott and T. W. Millard, hereby agree to repay to the said Charles W. Hathaway the above named sums of eight thousand dollars and five hundred dollars, with interest at the rate of three per cent per month until paid, together with any expense he may incur in the matter of this aforesaid purchase, and do also warrant and do hereby agree to defend him and save him harmless from any and all suits, claims and demands, of whatever name or nature, made against the said property or made against him in consequence of this purchase as aforesaid.

“JOSEPH SCOTT,

“T. H. SCRIBNER,

“T. W. MILLARD.”

It is said, in the first place, that the payment of the money by Hathaway is established as a fact by this paper. The pur-

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port of the document is that the money was paid by Hathaway for and on account of the persons who signed it, and who bind themselves to pay interest on the money until they shall have repaid the amount. These facts cannot be reconciled with the hypothesis that Hathaway bought and paid for the lands on his own account, and with a view to a resale to the plaintiff. The agreement to repay, and to repay with interest, is decisive that plaintiff and Hathaway, by the advance of the money, were, in their understanding of the matter, brought presently into the relation of creditor and debtor. (*Hickox v. Lowe*, 10 Cal. 197.) Nor is the fact that the deed from Higuera to Hathaway recites that the purchase money was paid by Hathaway conclusive upon the question. The recital may be explained or contradicted by parol. The point has heretofore been greatly controverted, but it is now settled by a weight of authority that at once precludes us from regarding the question as an open one, and relieves us from the necessity of doing anything more than referring to an accredited text book in which the cases are collected. (Hill on Trustees, 130-133.)

But it is further contended that the facts of the trust alleged were found upon insufficient evidence, even if the whole of the evidence should be assumed or be admitted to be lawful.

In a case like the present the party alleging the implied trust must prove clearly that the purchase money belonged to him; and if the evidence is merely parol it will be received with great caution, and the Court will look anxiously for some corroborating circumstances to support it. (*Levich v. Levich*, 10 Ves. 517.) We are not prepared to say that the finding of the Court here, does not rest on a basis of proof as broad as the rule contemplates. The fact that the land was paid for with money loaned by Hathaway to the plaintiff for that purpose was the governing question to be investigated; and the particular manner in which the money was manipulated, was, comparatively, of little concern. On the main question as thus stated, there was, on the one hand, the recital in the deed of Higuera that the money had been paid by Hathaway,

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grantee therein, and on the other it was confronted by the testimony of Millard, Scott, Smith, Higuera, Davis, Beard and the written contract of August 25th, already copied into this opinion, showing that the land was paid for with money borrowed by the plaintiff of Hathaway, resulting in establishing the relation of creditor and debtor between them. It is not our purpose to argue this point at length upon the evidence. There was other evidence introduced by the parties respectively which bore with greater or less directness and force upon the question. We have examined the whole of it, and in the light thrown upon it by the searching analysis to which counsel on both sides have subjected it, and we are satisfied that the rule of evidence before stated, was not overlooked nor disregarded by the Court in the conclusion to which it came, viz: that, to a legal intent, the plaintiff and the plaintiff's money paid for the land.

But it is further contended on the part of the appellants, that if the purchase money was in fact paid by the plaintiff, there could be no trust by implication as against Hathaway, for the reason that it was expressly stipulated that that which it would otherwise have been Hathaway's duty to do on demand—convey the land to the plaintiff—might be deferred by him, as matter of right, until his loan should be repaid. In support of this position counsel cite the maxim *Expressum facit cessare tacitum*. The principle contended for seems to be that the law will not imply at all if parties presume to narrow its implication by stipulation; but the maxim relied upon inculcates no such doctrine as that. In strictness, all that appertained to the case of the plaintiff, was to show that he paid the purchase money. That fact being established, the law would imply a trust, to be executed by a conveyance to the beneficiary on request. As against this conclusion the defendants allege, or, what amounts to the same thing, the plaintiffs admit, that it was expressly stipulated that the execution of the trust should be postponed for the benefit of the trustee until a certain event should happen; and the argument is that the controlling fact that the purchase money was paid

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by the plaintiff, was thereby at once divested of all significance, and became so utterly obsolete, that after the event stipulated had transpired, the fact that the plaintiff paid the purchase money, could not be brought forward and put to use. The difficulty, however, if there be one, is overcome by *Page v. Page*, 8 N. H. 187; *Boyd v. McLean*, 1 John. Ch. 582; *Cameron v. Ward*, 8 Geo. 245, and by the maxim *Expressum facit cessare tacitum* in the true reading of it. (Broom's Maxims, p. 414.) There is nothing in the stipulation going to the "creation" of the trust, and the loan named in it having been repaid, the case stands as though the stipulation had never been made.

The questions remaining to be considered relate to the case made for the defense.

It is alleged in the answer that after the conveyance by C. W. to E. V. Hathaway, the plaintiff "released and discharged him (E. V. Hathaway) from all claim, right, title in and to said described lands." This defense presupposes that the trust laid in the complaint once existed, and seeks to avoid it on the ground of the new matter stated. The burden of proving the defense was with the party alleging it. The Court has found against the allegation directly, and when specially moved to amend its conclusions of fact by finding that the release was at least proved by parol, the motion was denied. We have attentively examined the parol proofs as they stand related to the question. Parol evidence was freely introduced on both sides, and we are satisfied that the preponderance is with the result that the Court arrived at. But if the Court refused to find the release or discharge alleged on the ground that the fact could be proved by written evidence only, as is claimed by the appellants, still we consider that the Court did not in that particular mistake the law. As already remarked, the defense went upon the supposal that the plaintiff had originally an equitable estate in the land, but maintained that the estate had become extinct by release or surrender to the holder of the legal title. A release is not "by act or operation of law," but by the act of the party releasing,

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and therefore the act can be proved only "by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." (Wood's Dig. 106, Sec. 6; 107, Sec. 21; 108, Sec. 25.) It is to be observed that the point of the defendants' averment was not that the character of the event upon the happening of which the obligation of the trustee to convey was originally to mature, had been altered or shifted; for that might well have been, and the equitable estate survive, but that the estate itself had been destroyed.

The plea of the Statute of Limitations raised the question whether more than four years had elapsed since the plaintiff's right of action accrued and before the suit was brought. By the assignment of the debt, incurred by reason of the loan, and by the conveyance of the land by C. W. to E. V. Hathaway, who took with notice, the latter was placed in the shoes of his assignor and grantor. The rights of the plaintiff were neither increased nor diminished by reason of the transfer. If the transfer had not been made, the plaintiff could have had no right of action against C. W. Hathaway until after repayment of the borrowed money, and the same is true as to his assignee. The debt incurred by the loan was not fully paid off until the 31st of March, 1861, and the action was commenced January 9, 1863. To this it may be added, that there was evidence in the case tending to prove that E. V. Hathaway recognized the trust in repeated instances in 1860-'61, and that he never disavowed it until after the debt had been fully extinguished. As to the possession of the land, the tendency of the evidence was that it had been in Millard or his tenants since 1855.

As to the objection that all of the plaintiff's interest in the alleged trust had passed to his assignee in insolvency before this action was commenced, it is sufficient to say that in the specification of grounds to be relied on in support of the

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motion for new trial, the point is not made, and therefore it cannot be considered.

Judgment affirmed.

By the Court, SHAFER, J, on petition for rehearing.

It is insisted that the decision is opposed to *Cunningham v. Hawkins*, 24 Cal. 406, so far as the defense of the Statute of Limitations is concerned. It was held in that case that the mortgagor, after the lapse of four years, lost the right to pay or tender the mortgage debt in exoneration of the land mortgaged. But it does not follow from that, that a mortgagee loses either the power or right to accept payment of the debt after the statute has run upon it; and should he do so, then, the debt being extinguished by the payment, the land would be disencumbered by the direct force of the fact, and no bill to redeem would be either necessary or possible. In this case it may be admitted that Hathaway could not have compelled a repayment of the borrowed money after the four years had run, and that after that date the plaintiff had no power to make an effective tender. But the defendant was at liberty to accept payment in full, and having chosen to do so, he cannot relieve himself of liability to execute the trust according to its terms, on the ground that he might have refused to take the money. By force of the stipulation of August 25, 1855, no action could accrue to the plaintiff to compel a conveyance until the whole of the borrowed money had been repaid. After the lapse of four years it rested with Hathaway to say whether that event should ever happen or not. By his own voluntary action he allowed it to happen, and then, for the first time, Millard was clothed with a right of action against him. This is an answer to the objection that Hathaway never promised in writing to execute the trust. No written renewal is necessary to save a claim from the bar of the statute, in case the statute has not run upon it at the time when an action is brought to enforce it.

We have not overlooked the point made for the appellant,

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that C. W. Hathaway by conveying to E. V. Hathaway "asserted a right in himself adverse to his *cestui que trust*, and that the latter came in as a stranger asserting a right in himself, also adverse in its character." The proposition was fully considered, and was replied to, not directly, to be sure, but by advancing another proposition presenting the law of the facts stated as understood by us. In the pressure of business we often find it necessary to meet views presented by counsel by giving a direct exposition of our own.

By the expression "that the tendency of the evidence was that the possession of the land had been in Millard or his tenants since 1855," we would be understood to mean that there was evidence in the case tending to prove the fact, and that we could not readjudge the question upon the testimony. But we do not consider that it is a matter of any moment whether E. V. Hathaway was or was not in possession after the conveyance of the land and the assignment of the debt to him, for there is no plea that E. V. Hathaway had been in adverse possession of the land for five years.

It is urged that "a parol discharge of a written contract is available in equity to repel a claim upon that contract." We have not time to enter upon a critical examination of the authorities bearing upon that question; nor do we consider it at all material to do so. In the first place, we are not dealing with a contract "within the Statute of Frauds," but with a trust confessedly without it; and, in the second place, our statute expressly provides that the trusts to which it belongs can be surrendered only by act and operation of law, or by deed signed by the party, or by his agent thereunto duly authorized in writing. This provision, in our judgment, settles the question.

The Court below has found directly, that the borrowed money had all been repaid with interest at the rate of three per cent per month, as stipulated in the contract of loan. There was a conflict of evidence upon the point, and we are satisfied with the result at which the Court arrived; and if we were not entirely satisfied with it, we could not, as the bar is

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fully advised, readjudge the question upon the testimony. In a large proportion of the cases that come to this Court, we are invited and urged to reverse judgments on the ground that the conclusions of fact arrived at are not justified by the evidence; but under the settled practice of this Court, such attempts must always prove abortive, except in extreme cases.

In the opinion delivered, we said nothing about the newly discovered evidence as a ground of new trial, for the reason that the counsel of the appellants made no allusion to it in either of their briefs. In the first place it is admitted in both answers, in effect, that the eight thousand five hundred dollars and interest was paid and received on account of the land contract; and assuming that to have been the fact, we do not consider the general business relations of the two Millards to have been a material question. And in the second place, the evidence alleged to be newly discovered, is merely cumulative, and does not fall within any of the exceptions to the general rule prohibiting the granting of new trials on the ground of newly discovered evidence of that character.

Rehearing denied.

THE PEOPLE *ex rel.* STEPHEN R. HARRIS *v.* HENRY
M. HALE, AUDITOR OF THE CITY AND COUNTY OF SAN
FRANCISCO.

SALARY OF CORONER OF SAN FRANCISCO.—The Act of 1864, entitled "An Act concerning the salary and fees of the Coroner of the City and County of San Francisco," reduces the salary of the Coroner of said city and county from four thousand to two thousand dollars per annum. The fifth section provides that "this Act shall not affect the salary of the present incumbent during the term for which he is elected." *Held*, that the fifth section did not apply to a successor of the then incumbent, appointed after his death to fill his unexpired term.

PETITION for mandamus.

On the 18th day of May, 1863, B. A. Sheldon was elected Coroner of the City and County of San Francisco for the term of two years from and after the first day of July, 1863, and

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in due time he qualified and entered upon the discharge of the duties of said office. On the 8th day of April, 1862, the Legislature passed an Act providing that the salary of the Coroner of the City and County of San Francisco should be four thousand dollars per annum. This Act was in force when Mr. Sheldon entered upon the discharge of the duties of said office.

On the 12th day of March, 1864, the Legislature passed another Act, by section one whereof it was provided that the salary of the Coroner of the City and County of San Francisco "shall be two thousand dollars per annum," and by section five whereof it was provided, that "this Act shall not affect the salary of the present incumbent during the term for which he is elected."

On the 10th day of September, 1864, Sheldon, the incumbent, died.

On the 19th day of September, 1864, the Board of Supervisors appointed Stephen R. Harris, the relator, to fill the unexpired term of his predecessor. The relator qualified and entered upon the discharge of his duties.

The law made it the duty of the defendant, Henry M. Hale, who was the Auditor of the City and County of San Francisco, on the first day of each and every month, to audit and allow the salary of the Coroner for the preceding month, and draw his warrant upon the Treasurer for the amount. The relator claimed that his salary was four thousand dollars per annum for the unexpired term of his predecessor, and asked the Auditor to draw his monthly warrant at that rate. The Auditor refused to do so, claiming that the relator was entitled to only two thousand dollars per annum.

This was a proceeding commenced in the Supreme Court to obtain a writ of mandate, requiring the Auditor to audit and allow relator's salary at the rate of four thousand dollars per annum, and draw his warrant on the Treasurer for that amount.

J. W. Winans, for Relator.

John H. Saunders, for Respondent.

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By the Court, SANDERSON, C. J.

We think the meaning and intent of the Legislature, as expressed in the Act concerning the salary and fees of the Coroner of the City and County of San Francisco, (Statutes of 1863-4, p. 161,) is too obvious to admit of doubt. The evident design was to reduce the salary of the office as to any and all incumbents, except the then present incumbent. The fifth section performs the office of a proviso and excepts the "present incumbent" from the operation of the Act for a certain time, to wit, his present term of office. The effect of the exception is as much confined to Dr. Sheldon by the use of the words "present incumbent" as if his name had been directly employed. Had the Legislature said "This Act shall not affect the salary of the present incumbent (Dr. Sheldon) during the term for which he is (now) elected," it would hardly be contended that any other person than Dr. Sheldon was included in the exception; yet, although such language might have been more pointed perhaps, the meaning would scarcely have been more obvious.

The words "present incumbent" refer to the individual then holding the office, and not to his term of office. Had the Legislature intended, as counsel for the relator contends, to except the present term from the operation of the Act, they would have hardly employed the language which they did. They would have said, "This Act shall not take effect until after the expiration of the present term of office."

Some stress is laid upon the words, "during the term for which he is elected," and from their use it is argued that the term rather than the person is the object of the exception. We do not so read them. Had the section stopped with the word "incumbent," a question of construction would have been presented as to whether the "present incumbent" was not perpetually excepted from the operation of the Act and therefore entitled to the former salary if re-elected. This question of construction, though of obvious solution, was actually made in the case of *The People ex rel. Johnson v. Duden*;

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18 Cal. 696. There the Act stopped with the word "incumbent," and Johnson the relator insisted that he was perpetually excepted from its operation and entitled to the former salary so long as he might hold the office. It was held, however, that the exception did not extend beyond his then present term. The words in question were obviously used for the purpose of more precisely defining the exception made and thus leave no occasion for a resort to judicial construction. The meaning of the section finds full expression in the following paraphrase: "This act shall not affect the salary of the present incumbent, Dr. Sheldon, but this exception in his favor shall not continue longer than his present term of office." It is true that in its absence judicial construction would have supplied the latter clause, but the Legislature saw proper to supply it themselves and leave nothing to construction.

Mandamus denied.

THE PEOPLE *ex rel.* H. A. WRIGHT *et als.* v. THE
COUNTY JUDGE OF PLACER COUNTY.

VIOLATION OF AN INJUNCTION.—The District Court alone has jurisdiction to try and punish for a contempt for the violation of an injunction issued out of the District Court.

PETITION for writ of prohibition.

This was an original proceeding commenced in the Supreme Court to obtain a writ of prohibition, to prevent the County Judge of Placer County from proceeding to try and punish for contempt the relators, who were charged for violating an injunction issued out of the District Court.

H. H. Hartley, for Relators.

Chas. A. Tuttle, for Respondent.

Opinion of the Court.

By the Court, SHAFER, J.

This is a petition for a writ of prohibition. The petition represents that on the 15th day of June, 1864, Griffith Griffith exhibited his bill of complaint in the District Court of the Fourteenth Judicial District, against J. P. Robinson and others, and in said action prayed for the issuance of a writ of injunction. That after the filing of the bill in the District Court, Griffith made an *ex parte* application to the defendant, County Judge, etc., for the writ, to be issued out of the said District Court, and that it was thereafter so issued by the order of said Judge. That subsequently proceedings in contempt against relators were commenced, and are now pending in the County Court of Placer County, wherein they, the relators, are charged with a violation of the injunction. The petition charges that the County Court has no jurisdiction in the matter of those proceedings.

A County Judge in granting an injunction upon a bill filed in the District Court, acts as an injunction master, and exercises a power auxiliary to the jurisdiction of the District Court. The effect of the order is the same as if made by the District Court, and the injunction is subject to be controlled, modified or dissolved by the District Judge, the same as if issued by his order in the first instance. (*Crandall v. Woods*, 6 Cal. 449; *Borland v. Thornton*, 12 Cal. 440.)

The contempt complained of was neither a contempt of the County Court nor of the County Judge, but of the District Court in which the action was pending, and by whose authority, in legal contemplation, the writ of injunction was issued; and it follows, if the relators were guilty of disobeying the writ, that the injunction to try and punish them for the contempt is in the District Court alone.

Rule made absolute.

Mr. Chief Justice SANDERSON expressed no opinion.

Argument for Appellant.

FELIX B. HIGGINS, TRUSTEE, ETC. v. THE BEAR RIVER AND AUBURN WATER AND MINING COMPANY.

UNITED STATES LEGAL TENDER NOTES.—United States notes issued under and by authority of the Act of Congress of February 25th, 1862, entitled "An Act to authorize the issue of United States notes," etc., and the Act of March 3d, 1863, entitled "An Act to provide ways and means for the support of the Government," are lawful money and a legal tender in payment of all private debts contracted before the passage of said Acts, unless by the terms of the contract creating the debt the debtor promised to pay in gold or silver coin.

LAWS MAKING UNITED STATES NOTES LAWFUL MONEY.—The Acts of Congress making United States notes lawful money and a legal tender in payment of debts are not laws operating retrospectively, but *in presenti* and prospectively.

HOW PROMISE TO PAY MONEY GENERALLY SATISFIED.—A promise to pay money generally, can be satisfied by a payment in any kind of currency that becomes lawful money and a legal tender during the interval through which the relation of debtor and creditor shall be extended.

DISCRIMINATION BETWEEN KINDS OF MONEY.—Courts cannot discriminate between one kind of money and another in cases where neither the parties contracting nor the laws have made any such discrimination.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The facts are stated in the opinion of the Court.

Charles A. Tuttle, for Appellant.

H. H. Haight, also for Appellant.

The Act of Congress making Treasury notes a legal tender is not retrospective by its terms. It is not declared that the notes shall be a tender in payment of "all debts, public and private," contracted before the passage of the Act. The term "all debts, public and private," has no express reference to prior debts, and involves no idea of time, but is used as a comprehensive phrase to include all classes or kinds of debtors and creditors. It must, therefore, upon well settled principles, be considered as referring exclusively to debts contracted after its passage.

The rule of interpretation is stated by all the authors, that statutes are not to be construed retrospectively, or to have a retroactive effect, unless that intention is expressed in terms.

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and not even then, if by such a construction the Act would divest vested rights. (Sedgwick on Stat. 184, 188, 189, 407, etc.; Smith's Com. 679, Sec. 533, and cases cited in Notes; Bacon's Abr. Tit. Statutes, [C]; 2 Exchequer R. 22; 7 Johnson, 477, 499, etc.; 2 Modern R. 310; 4 Serg. & Rawle, 401; 4 Burrow, 2,460; 3 Shepley, 134; 1 Scammon, 335; 2 Scammon, 499; 3 Call R. 278; 1 Blackstone's Com. 46; 3 Serg. & Rawle, 597, 598; 1 Kent's Com. 408, marg. 455; 3 Dallas, 390, 391; 2 Hill, N. Y. 239; 2 Paine's C. C. R. 504, 516, 517; 54 Eng. Com. L. R. 549; 3 Edwards' Ch. R. 464; 12 Johnson, 174; 10 Wendell, 114; 4 Denio, 376; 2 Comst. 184; 8 Wendell, 663; 1 Cal. 65; 4 Cal. 131; *Sanford v. Bennett*, 24 N. Y. 20.)

There is no expression in the statute which lays the foundation for an exception to the rule, nor any consideration growing out of the subject — no motive of patriotism, justice, or public policy, favors a different rule. On the contrary, the natural repugnance of every just mind to fraud, injustice, and oppression, unite with regard for the honor of the Government, to urge adherence to a rule established in sound wisdom, sanctioned by an unbroken current of judicial decisions, and approved by the experience of all past ages.

Well known rules in the construction of statutes ought not to be departed from. (*Douglas v. Howland*, 24 Wend. 45-7.)

Tweed & Craig, for Respondent.

The rule of construction is not correctly stated by appellant, viz.: "That statutes are not to be construed retrospectively or to have a retroactive effect, unless that intention is expressed in terms, and not even then, if by such a construction the Act would divest vested rights."

Two classes of cases are cited as supporting this proposition, of which only one class is founded upon *mere rules of construction*. In the other class the decisions are founded upon the *fact* that the Legislature in passing the particular Act in question, attempted to legislate upon a subject or in a manner for-

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bidden it by some superior or constitutional law, or in other words, in a manner beyond its *power*.

This class of cases has no application here, as we understand it to be admitted that Congress had ample *power* to make the Legal Tender Acts retrospective, the only question being whether it has done so.

And the other class which bears upon the question of construction does not sustain the proposition of appellant, stated broadly as it is.

The Acts in question are purely remedial. The Legal Tender Acts, both as to metallic and paper currency, create, define and prescribe the ultimate of all remedies, (excepting specific performance, ejectment, etc.,) and the process of Courts are merely auxiliary, and designed to secure this ultimate. The substances declared to be a legal tender, and thus the ultimate remedy, are so only by virtue of the law, and not on account of their intrinsic value; no matter what the influence of their intrinsic value in determining their selection.

The only office of the Treasury Note Acts is to add another substance to this ultimate legal remedy. They are not objectionable as even slightly impairing any vested rights of appellant.

J. McM. Shafter, also for Respondent.

Pong v. John de Lindsay et als. 1 Dyer, 822, and note, is an old case to show that the debasement of the currency is at the loss of the creditor.

In case of a contract made in one country, to be executed in another, as to interest, mode of execution, breach, form of action, rules of evidence and defense, the law of the place of execution, that being the forum, governs.

This is because the parties are presumed to submit their contract to the solution of the foreign law.

Why should not the parties be presumed to have made their contract in this case with the intention of submitting its construction to the law of the *time* of its execution. The analogy is certainly entitled to some weight.

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That Congress must have meant all *existing* debts as well as all subsequently accruing, is involved in the simple expression they use—"debts."

The language is the same as that in the Bankrupt Act of 1841. U. S. S. at Large, Vol. 2, p. 19, and *post*, Secs. 1, 2, 6, use the words "debt" and "debtor," "due and owing." Section thirty-four provides that the bankrupt shall be discharged from "all debts."

All the decisions under this Act interpret this language as covering past debts. Why should not the same term have the same resolution in the statutes creating legal tenders?

Chap. 52, 5 U. S. S. at Large, p. 9, provides that no bank bills less than twenty dollars shall be paid on account of pensions. So undoubted was the power of Congress to make such bills legal tenders that a proviso forbids anything but gold or silver being a legal tender. This provision as to the size of the bills was changed. (Chap. 8, p. 440.)

The distinction in the descriptive phrases and the legal uses of "legal tenders" and notes issued by the national banks, is important. (12 Statutes at Large, p. 670, Sec. 20.) Bank paper may be issued and circulated *as money*, and shall be received at par, and with certain exceptions shall be received and paid out by the United States upon all debts and demands.

But this kind of money is not made a tender for private debts, nor does the Government retain the right "in terms" to tender it.

It is deemed unnecessary to collate the language or sections, further than to say the legal tender statutes speak of the debt as a fact existing at the time of their passage; of the relation of debtor, and the obligation involved in the terms "due" and "owing" as one "past and existing," and having no relation to the future but the simple one as to the manner of its discharge.

Opinion of the Court.

By the Court, CURREY, J.

In the years 1858 and 1859, the Bear River and Auburn Water and Mining Company—a corporation—became indebted to the plaintiff as trustee for certain owners and holders of bonds issued by the company, amounting, in the aggregate, to the sum of thirty thousand dollars. These bonds were made and issued by the company at different times during the years mentioned. Each of the bonds was in the sum of five hundred dollars. These bonds were drawn and made payable as follows: One third in twelve months, one third in eighteen months, and one third in twenty-four months from the time they were issued, with interest thereon at the rate of two and a half per cent per month, payable quarterly. The debts thus created were secured by a deed of mortgage, executed and delivered on behalf of the corporation to the plaintiff, in trust for the owners and holders of the bonds. The mortgage was duly recorded.

The plaintiff commenced an action in December, 1861, in the District Court of the Eleventh Judicial District, in and for Placer County, to recover judgment for the amount due on the bonds and to obtain a decree for the foreclosure of the mortgage and for the sale of the mortgaged property, and, in April following, the Court made a decree and judgment in the cause, by which it was ascertained and determined that there was due from the defendant to the plaintiff, as trustee, on the bonds set forth in the complaint, the sum of twenty-eight thousand two hundred and seventy-seven dollars and thirty-five cents, and adjudged that the amount due should bear interest at the rate of two and a half per cent per month from the date of the judgment; and also decreed a foreclosure of the mortgage, and that the mortgaged property be sold according to the practice of the Court in such cases, for the payment of the sum due and the interest to accrue thereon. In April, 1864, the plaintiff caused process—an order of sale of the mortgaged property—to be issued, and placed in the hands of the Sheriff to enforce payment of the amount then

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due on the judgment. After the order of sale had come to the hands of the Sheriff, the defendants tendered to him the amount due on the judgment, and also the interest due thereon, and all costs that had accrued. The kind of money tendered was United States notes, issued under and by authority of the Act of the Congress of the United States, passed on the 25th day of February, 1862, entitled "An Act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States;" and the Act passed on the 3d day of March, 1863, entitled "An Act to provide ways and means for the support of the Government." The Sheriff refused to receive the money tendered, whereupon the defendant paid it into Court for the plaintiff, and then moved the Court that the judgment be declared satisfied, and that the Sheriff be required to return the order of sale then in his hands. The Court thereupon made an order, reciting the facts and directing satisfaction to be entered of judgment and decree, and that the Sheriff return the order of sale. Upon this the Sheriff made his return, as directed, and the same was filed in the office of the Clerk of the Court, and satisfaction of the judgment and decree was entered of record. From the order so made the plaintiff has appealed.

The question to be determined is whether or not United States notes issued under and by authority of the Acts of Congress mentioned, were at the time the tender and payment into Court were made, a legal tender in the payment of debts which were created and became due before the passage of those Acts, when the written instrument, which is the evidence of the indebtedness, does not provide in what kind of money the debt shall be paid, otherwise than in dollars generally.

The plaintiff does not question the validity of the Acts of Congress making United States notes lawful money and a legal tender in the payment of debts, but he maintains that this kind of money, by a fair construction of the Acts of Congress, has never constituted a legal tender in the payment of debts contracted before the passage of the Act of the 25th of Feb-

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ruary, 1862, and in support of this position is invoked the general doctrine that a statute ought not to be so construed as to give it a retrospective operation so as to affect contracts entered into previous to its enactment, if it will bear any other interpretation. That such is the doctrine of the law, having for its basis principles and reasons which cannot be set aside without at the same time holding that the obligation of contracts may be impaired and even destroyed, is not to be denied.

A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, is to be deemed retrospective. (2 Gallison, 105, 139; Sedgwick on Stat. and Const. Law, 188; Smith's Com. on Stat. and Const. Law, Sec. 149.) It is a rule never to apply a statute retrospectively by mere construction. (*Jarvis v. Jarvis*, 3 Ed. Ch. R. 464.) It was held by Mr. Justice Spencer in *Dash v. Van Kleck*, 7 John. 447, that all laws are to be construed according to the intention of the Legislature, and in getting at that intention Courts must presume a prospective and not a retrospective operation was meant unless such presumption is repelled by express words; and in *Harkley v. Sprague*, 10 Wend. 113, Mr. Chief Justice Savage said all statutes are to be construed prospectively and not retrospectively unless they are otherwise incapable of a reasonable construction. (*Jackson v. Van Zandt*, 12 John. 174; *Palmer v. Conley*, 4 Den. 376, and 2 Com. 184; *Sayre v. Wisner*, 8 Wend. 663; *Johnson v. Burrell*, 2 Hill, 239; *Berley v. Rampacher*, 5 Duer, 183; *Wood v. Oakley*, 11 Paige, 403; *Sandford v. Bennett*, 24 N. Y. 20; *Taylor v. Turrett*, 9 Cranch, 43; *Thompson v. Lack*, 54 E. C. L. 540.) The rule of construction stated, and which is sustained by an unbroken current of decisions, is one that should be adhered to with undeviating exactness.

The Acts of Congress under consideration making United States notes lawful money and a legal tender in the payment of debts are not laws operating retrospectively but *in presenti* and prospectively. No new obligations are created nor new

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duties imposed by them; neither do they attach new disabilities in respect to transactions or considerations which had transpired before their passage. They simply provide that the notes issued by their authority shall be lawful money, and that such money shall be a legal tender in the payment of debts. What debts? The answer is, all debts public and private within the United States, except duties on imports and interest on the bonds and notes of the United States. The Acts of Congress, so far as they declare that treasury notes shall be a legal tender in the payment of debts, make no reference to the time when the obligation had its inception. They operate directly upon subsisting debts, recognizing the existing relations of debtors and creditors, and declare that a certain kind of money, which is made lawful money by the sovereign authority, shall be a legal tender as well as other kinds of money, in the payment of debts then due, or to become due thereafter while such money may be a lawful currency and a legal tender in the payment of debts. Do they impair the obligations of contracts made or rights acquired and vested under previously existing laws? If such was their effect we are free to say we should not regard ourselves obliged to lead in upholding them. But is such their effect? To answer this inquiry it is only necessary to refer to the contract in question, made long before the passage of these Acts of Congress, and to understand its import. It is simply an agreement to pay certain sums of money at an appointed time. This was not a contract to pay any particular kind of money other than such as might be a legal tender in the payment of debts at the time thereafter when the debt created should be due and unpaid. Such was the promise or undertaking of the defendant in the case before us, and nothing beyond this; and such being the contract, was it not competent for the defendant to perform it by a literal compliance with its terms? The defendant's promise, which the plaintiff accepted, we repeat, was not to pay in any particular kind of money, but in effect to pay a certain number of dollars in any kind of currency that should be or become lawful money and legal tender during the interval

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through which the relation of debtor and creditor should be extended; and when the debtor tendered and paid into Court the amount due, in money which, by the law of the land, was a legal tender in the payment of debts, all that the creditor could exact and enforce under the contract was performed. We cannot say any contract obligation was violated by holding that the payment tendered and made was valid and effective, without first deciding that United States treasury notes are not what the Act of Congress declares them to be. In *Lick v. Faulkner*, 25 Cal. 404, and other cases, we held the Acts of Congress making United States notes lawful money and a legal tender in the payment of debts, to be constitutionally valid and binding. If such notes are money in the sense declared in *Lick v. Faulkner*, the judicial department of the country cannot say a dollar of such currency is worth more or less than a dollar of any other kind of money. Were we to undertake to discriminate between one kind of lawful money and another, in cases where neither the parties contracting nor the laws of the country have made any distinction between them, we should be involved in an inextricable absurdity, besides which our judgment would not be an exposition of the laws as we find them, but would be an exercise of legislative power abrogating the Acts of Congress.

When the tender was made, United States notes were a legal currency, and the obligation of the defendant, by the terms of his contract, was to pay a certain number of dollars generally. In *United States v. Robertson*, 5 Peters, 660, Mr. Chief Justice Marshall said that an obligation to pay money in general terms may be discharged by payment in legal currency; and in *Faw v. Marsteller*, 2 Cranch, 26, the same Judge in a case analogous to the one before us, in answer to a position assumed and maintained by counsel in that case, said: "The position that the value of money at the time of the consideration for which it was to be paid was received, is the standard by which the contract is to be measured, is not the correct one." In the case of *Metropolitan Bank v. Van Dike*, decided by the New York Court of Appeals in 1863, (27 N.Y. 401,) the identical

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question involved in this case was very elaborately and ably discussed at the bar and considered by the Court, and it was held that United States notes issued under the Act of the 25th of February, 1862, were a valid tender in payment of a debt contracted and due long before the passage of the Act.

If it were admissible in judicial proceedings to open the door to evidence to show, for instance, that at a particular date a hundred dollars in United States notes were worth only forty dollars in gold coin, not only would the laws of Congress making these notes lawful money and a legal tender be annulled and held for naught, but consequences of a most preposterous and disastrous character would be likely to follow. In after years, when the notes issued under these Acts of Congress may become absorbed, and gold and silver coins shall be the only lawful money in the land, the inquiry would be, what was the difference in the value between the two kinds of money when the contract was made? Then, if it should appear that at the date of the contract, a hundred dollars in United States notes was worth only forty dollars in gold coin, the creditor would be entitled to recover only forty dollars, though his debtor's promise was to pay him one hundred dollars. It is needless to add illustrations of the confusions and mischiefs that would result were the Courts to hold that one kind of money is worth more or less than another kind, notwithstanding by sovereign behest there is no difference between them. The laws of Congress place the two kinds of money on an equality, so far as the case at bar is concerned, and therefore it results from existing conditions that the money tendered and paid into Court was as effectual to the discharge of the defendant's obligation as the same amount of United States gold coin would have been had the payment been tendered in that kind of money.

The conclusion to which we are forced by the conditions of the subject matter involved is, that the tender of United States notes constituted a legal tender for the payment of the amount

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due, and therefore the order made by the Court was correct and should be affirmed.

Order affirmed.

CHARLES D. SEMPLE *v.* GEORGE HAGAR *et als.*

COMPLAINT FOR RELIEF ON GROUND OF FRAUD.—In an action brought to vacate a patent for land on the ground that its issuance was procured from the Government by false suggestions, fraudulent concealments, and by misrepresentations, the acts of fraud and misrepresentation on which the general charge is based must be specified in the complaint, or it will not state facts sufficient to constitute a cause of action.

JUDICIAL NOTICE OF PROCEEDINGS TO OBTAIN PATENT.—The Supreme Court will take judicial notice of the fact, that the claimant of land under a Mexican or Spanish grant, presented his petition to the Board of Land Commissioners for the confirmation of his title, and that the same was confirmed by said Board, or the District or Supreme Court of the United States, before the patent was issued.

FACTS FOUND BEFORE CONFIRMATION OF GRANT.—The Board of Land Commissioners, or the United States Court, in passing upon and confirming a Mexican or Spanish grant of land, must necessarily find, not only that the alleged grantee was in fact the grantee of the Mexican or Spanish Government, but also that he was competent to take the grant.

A DECREE CONFIRMING A GRANT OF LAND.—A decree of the Board of Land Commissioners or of a Court of the United States, confirming a Mexican or Spanish grant of land, cannot be attacked in another action, on the ground that the grantee was not competent to take the grant, by reason of having received a grant of more than eleven square leagues of land before he obtained the grant confirmed.

SUIT TO VACATE A PATENT FOR LAND.—A patent issued by the United States for a confirmed Mexican or Spanish grant will not be vacated by a State Court because the grantee had received a donation of more than eleven square leagues of land from Mexico or Spain before he received the grant confirmed.

JUDGMENTS OF FEDERAL COURTS.—State Courts cannot set aside or indirectly review the judgments of the Federal Courts made in matters of which the Federal Courts have jurisdiction.

APPEAL from the District Court, Tenth Judicial District, Colusa County.

Plaintiff appealed from the judgment of the Court below dismissing the action.

The other facts are stated in the opinion of the Court.

Semple, and *Edwards*, for Appellant.

The State Courts have jurisdiction of patents issued by the

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United States for land within the State. (See *Sarpy v. Papin*, 7 Missouri, 503; *Allison v. Hunter*, 9 Ib. 741; *Barry v. Gamble*, 8 Ib. 88; *Wright v. Rutgers*, 14 Ib. 585; *Gorman v. Johnson*, 20 Ib. 108, etc.; *Arnold v. Grimes & Chipman*, 2 Iowa, 1; *Waterman v. Smith*, 13 Cal. 416; *Doll v. Meador*, 16 Cal. 330.)

The demurrers admit all the obligations of the bill; therefore, for the purposes of this trial, it is true that twelve square leagues of land in the Californias were granted to Manuel Jimeno Casarin prior to the date of the grant in question.

The Supreme Court of the United States, in the case of the *United States v. Hartnell's Executors*, 22 Howard, 286, having declared, in unequivocal terms, that such a grant was void—there being no power in the California Governors to make grants except as directed in the law of 1824—(see *United States v. Vallejo*, 1 Blackstone, 541)—the only question is, whether a valid patent can be issued on a void grant? Has a void thing any life, or a germ in it out of which a living thing can be reared? Can the adjudication under the Act of 1851 create a grant? The Governors of California had already exhausted all the official power given them by law, in favor of Jimeno, by granting him twelve leagues of land, and by inevitable sequence the act of issuing *this* grant was merely the act of an individual, and could have no more force than if a paper of the same purport had been signed and delivered by any other citizen of the Californias.

On this point we are sustained by the leading cases of *Jackson v. Lawton*, 10 Johnson, 25; and *Patterson v. Winn*, 11 Wheaton, 380, re-affirmed in *Doll v. Meador*, 16 Cal. 330.

A. C. Whitcomb, for Respondent Hagar.

The object of this action is "to repeal and vacate a patent issued by the United States;" and it has been held by this Court over and over again, (see *Leese v. Clark*, 18 Cal. 571, 572, 575; *Leese v. Clark*, 20 Cal. 423,) that a patent is a record of the Government, showing its action

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and judgment upon the title of the patentees; and "upon all the matters of fact and law essential to authorize its issuance it imports absolute verity; and it can only be vacated and set aside by direct proceedings instituted by the Government, or by parties acting in the name and by the authority of the Government." (18 Cal. 572.) As the vacating and setting aside of a patent is, therefore, a proceeding to which the United States must be a party, and as the Federal Courts have exclusive jurisdiction of actions to which the United States is a party, there is no escape from the conclusion that the District Court of the Fifteenth Judicial District of this State had no jurisdiction over the question of repealing and vacating the patent.

By the Court, RHODES, J.

The appellant denominates this action "a bill in equity, brought to repeal and vacate a patent issued by the United States, to Thomas O. Larkin and John S. Missroon for the Jimeno grant," or, as he states in another portion of his brief, and which amounts to the same thing in substance, a bill "to quiet the title to the Colus grant by vacating the Jimeno grant."

He states in his complaint that the Colus grant was granted to John Bidwell; that Bidwell conveyed the grant to the appellant; that in 1855 the title was finally confirmed to him; that the survey of the grant was approved by the United States District Court in January, 1860; that he has sold divers lots and tracts of the grant, and that he now is in possession of the unsold part of the grant. He further states that prior to November, 1844, certain Governors of the Californias granted to Manuel Jimeno Cassarin two ranchos—called "Sal si Puedes" and "Santa Paula y Saticoy"—containing in the aggregate twelve Spanish leagues of land; that "the said Manuel Jimeno Casarin, well knowing that he had actually received, as donations from the Mexican nation, twelve square leagues of land within the Californias, and, well knowing that

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it was in violation of the laws of Mexico for any one individual to own or hold more than eleven square leagues of land, yet contriving to deceive and defraud the Mexican nation, did fraudulently and unlawfully, on the 4th of November, 1844, petition for, and Manuel Micheltorena, then Governor of the Californias, did fraudulently and unlawfully and upon false suggestions grant to the said Manuel Jimeno Casarin another rancho, commonly called 'Jimeno Rancho,' containing eleven leagues of land," etc.; that Manuel Jimeno Casarin then held the two ranchos formerly granted to him; that he transferred the Jimeno grant to Larkin and Missroon; that "some proceedings in some suit or controversy" were had between them and the United States; that in 1862 a patent founded on the grant was issued to them for the Jimeno Rancho, and that they procured the patent to be issued "by false suggestions, fraudulent concealments and misrepresentations." He further states that the Jimeno grant overlaps a portion of the Colus grant—that it is a cloud upon his title in the Colus grant, and that Hagar, one of the respondents, claims that portion of the Jimeno grant that overlaps the Colus grant.

The respondents demurred to the complaint on several grounds, two of which were that the Court had no jurisdiction of the subject of the action, and that the complaint does not state facts sufficient to constitute a cause of action, and the demurrers were sustained, and the plaintiff failing to amend, judgment was rendered dismissing the action.

The object of the action is to impeach and set aside the patent for the Jimeno grant, or to avoid so much of it as covers lands within the Colus grant, and the ground of invalidity alleged against the patent is, that Larkin and Missroon procured it to be issued by "false suggestions, fraudulent concealments and by misrepresentations;" but the acts of fraud and misrepresentation on which the general charge is based, are not specified, and for that reason the complaint is defective in not stating the requisite facts. But we do not intend to rest our decision on that ground. It is charged that Jimeno committed a fraud upon the Mexican Government in procuring

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the Jimeno grant, while he was the grantee and the owner of two other grants containing over eleven leagues of land, and that is the fraud upon which the appellant relies, and which he claims tainted all the subsequent proceedings down to and including the patent. It may be admitted, for the purposes of the case, that Larkin and Missroon had a knowledge of this fraud—though it is not so stated in the complaint—and that they not only did not inform the Courts before which the proceedings were had for final confirmation, or the executive officers who issued the patent, of the facts constituting the fraud, but that they studiously misrepresented the facts to those tribunals and officers. We deem it unnecessary in the present aspect of the case to determine the points argued by counsel, whether the United States are proper parties, or whether the appellant, not having received a patent for his lands, occupies such a position, as the assignee or grantee of the Government, that he can sue either in the name of the United States or in his own name. But conceding that he is the proper party, the inquiry arises whether the facts as stated, and as we have admitted for the purposes of the case, constitute such a cause of action as would authorize the Court to order the patent vacated.

The Court will take judicial notice that, according to the provisions of the Act of Congress of March 3, 1851, every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican Government, should present his petition for the confirmation of his title to the Board of Land Commissioners, and that such proceedings must be had thereupon, before said Board or the District or Supreme Court of the United States, that a final decree confirming the title of the claimant to the land must be entered before the patent for the land could be issued. A patent could not be issued for the land claimed under a Mexican grant, unless such proceedings were first had for the confirmation; and it is not pretended that they were not had in respect to the Jimeno grant. The patent was issued only in pursuance of the decree of confirmation, and for the purpose of carrying it into effect.

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In the language of Mr. Chief Justice Field, in speaking of the operation and effect of such a patent: "It is the last act of a series of proceedings taken for the recognition and confirmation of the claim of the patentees to the land it embraces, the first of which was the petition to the Board of Land Commissioners." (*Leese v. Clark*, 18 Cal. 535.) The decree of final confirmation was essential to the patent as a judgment to an execution. The appellant says that "some proceedings were had in some suit or controversy between said Larkin and Missroon and the United States, and that, on the — day of —, 1862, the United States Government issued a patent founded on said fraudulent grant to said Larkin and Missroon," and, as before remarked, it is not pretended that the proceedings required by the Act of Congress were not had.

The Board or the Court, in passing upon the claim and confirming it, must of necessity have found as a fact, not only that Jimeno was the grantee of the Mexican Government, but also that he was competent to take the grant. True, this may not have been done in direct terms, as in the case of *United States v. Reading*, 18 How. 1, and *United States v. Harnell's Executors*, 22 How. 286, and other cases; but the fact must have been ascertained, at least by implication. The fact is as necessary to the confirmation of the grant as the fact that the land granted was situated within California, and must have been and was judicially determined by the Court that pronounced the decree; otherwise, we would have the case of a grant without a grantee. The only forum in which this fact can be found, or the questions relating to it investigated, during the series of proceedings that end with the patent, is the Board of Land Commissioners or the United States District or Supreme Court. Their jurisdiction of all the matters touching the claim of the petitioner to the land and of proceedings for final confirmation is plenary and exclusive. The appellant seeks to set aside the patent on the ground that the decree, in pursuance of which it was issued, was rendered in confirmation of a grant that had no legal existence—that was made by the Governor of California contrary to law; and the

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suit is in effect a proceeding in a Court of this State to set aside the decree of final confirmation, entered in the proper Court of the United States; for the facts alleged in the complaint do not tend to show that the patent was improperly issued upon a valid decree, but that it was issued upon a decree that ought not to have been rendered, if the true state of the facts respecting the grant had been before the Court pronouncing the decree — a decree that was procured by the fraudulent concealment and misrepresentation of the claimants in respect to a fact that was material to the issues in the case.

The old and very general rule on this subject is stated by Mr. Chief Justice de Grey in *Duchess of Kingston's Case*, 11 Har. State Trials, 262: "But if it (the judgment) was a direct and decisive sentence upon the point, and as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within, yet like all other acts of the highest judicial authority, it is impeached from without. Although it is not permitted to show that the Court was mistaken, it may be shown that they were misled. Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of justice." Although the strictness of the rule has been in many cases modified, and parties have been permitted to obtain relief in equity against judgments and decrees obtained by fraud and imposition, yet if it appear that the defendant had knowledge of the fraud in time to have availed himself of it in his defense, and neglected to do so, or if by reasonable diligence he could have ascertained and proven the true state of the facts, in respect to which the fraud is alleged, and neglected to make the proof, the Court will not grant him relief. (*Le Guen v. Gouverneur and Kemble*, 1 J. Cases, 465; *Marine Ins. Company v. Hodgson*, 7 Cranch, 332; Will. Eq. 160.) It not only does not appear that the United States did not know of the grants made to Jimeno prior to the making of the Jimeno grant, but from the fact that they succeeded the Mexican Government in California, and came into possession of the archives of the former Government, every presumption is in favor of their having knowledge of the prior grants, and no fact is stated to

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rebut that presumption. The Government having neglected to avail itself of the prior grants to Jimeno as a defense, no one will be permitted after the final decree, to set up the same facts, as an independent ground for relief.

Admitting that relief might be granted in a proper case with the proper parties, can the Courts of this State set aside, or indirectly review the decisions of the Federal Courts? This is not an open question. In *Peck et al. v. Jenness et al.*, 7 How. 624, Mr. Justice Grier, in delivering the opinion of the Court, says: "It is a doctrine of the law too long established to require citation of authorities that when a Court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every Court; and when the jurisdiction of a Court and the right of a plaintiff to prosecute his suit in it have once attached, the right cannot be arrested or taken away by proceedings in another Court." (See also *United States v. Peters*, 5 Cranch, 115; *Freeman v. Howe*, 24 How. 450; *United States v. Booth*, 21 How. 506; *Mott v. Smith*, 16 Cal. 533.)

The decision in this case does not in any degree impair the jurisdiction of the State Courts to pass upon and determine the rights of parties claiming under conflicting patents issued by the General Government in pursuance of decrees of confirmation, but the jurisdiction is denied to them to attack or collaterally review the decisions of the Courts of the United States, made in matters of which they have the acknowledged jurisdiction.

Judgment affirmed.

SAWYER, J., concurring specially:

I concur in the judgment.

Argument for Appellant.

LELAND STANFORD, GOVERNOR, JOHN F. CHELLIS, LIEUTENANT-GOVERNOR, AND WILLIAM H. WEEKS, SECRETARY OF STATE, AND *ex officio* MEMBERS OF THE BOARD OF STATE PRISON DIRECTORS OF THE STATE OF CALIFORNIA v. GEORGE A. WORN, *et al.*

PROCEEDINGS TO CONDEMN LAND.—In order to render proceedings for the condemnation of land for the use of the State effectual for any purpose, the provisions of the statute by which they are authorised must be strictly followed.

PLAINTIFF IN PROCEEDINGS TO CONDEMN LAND.—If the Act authorizing proceedings for the condemnation of land directs them to be commenced in the name of the People of the State, and they are commenced in the name of the Governor, Lieutenant-Governor, and Secretary of State, this renders the whole proceeding a nullity.

TIME OF PUBLICATION OF NOTICE.—If the Act authorizing proceedings for the condemnation of land directs a notice to claimants to be published for four weeks, and only twenty-four days elapse from the day of the first publication to the day the defendants are notified to appear, the Court acquires no jurisdiction over parties who do not voluntarily appear in the action.

CONTROL OF COURT OVER PROCEEDINGS TO CONDEMN LAND.—The Court does not lose its control over proceedings for the condemnation of land by reason of its adjournments at any time, but it continues as unfinished business until the deed is made and money paid over under the order of the Court.

WHEN PROCEEDINGS CONDEMNING LAND ARE VOID.—If, after proceedings have been taken to condemn land for the use of the State, the damages have been assessed, and a decree of condemnation entered, it shall appear that the State has acquired no title by the decree, the Court should, on motion of the Attorney-General, quash all the proceedings, and order the money to be refunded to the State.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. G. McCullough, Attorney-General, for Appellant.

The motion of the Attorney-General to quash said proceedings, and to permit the State to withdraw the moneys from the custody of the Court, should have been granted.

First—The proceedings were irregular and void, and the State wished to dismiss them. It removed a cloud from claimants' title. (*Bensley v. The Mount. L. W. Co.*, 13 Cal. 314.)

Second—The moneys belonged to the State. They were

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taken from her Treasury. No other had a vested right to the money until she had a vested right to the land. Getting no title to the latter, she had not lost title to the former. It is not the case of abandoning lands after they have been legally condemned, and thus making the former owner buy back the land or the easement. (*Hawkins v. The Trustees of Rochester*, 1 Wend. 53; *People v. Supervisors of Westchester*, 4 Barb. S. C. 64, 76; *Smart v. Portsmouth & C. R. R.*, 20 N. H. 233, 239; *Hampton v. Com'th*, 7 Harris, 19 Pa. 329, 334.)

Patterson, Wallace & Stow, for Respondents.

By the Court, SANDERSON, C. J.

This is an action to condemn certain lands at Point San Quentin for State Prison purposes, under the provisions of an Act of the Legislature passed for that purpose, as amended in 1863. (Statutes of 1863, p. 224.) That Act authorizes the Attorney-General "in the name of the People of the State of California," to bring an action in one of the District Courts of any county adjoining the County of Marin, for the condemnation of all such lands as the State Prison Directors may deem necessary for the convenience of the Prison and the use of the State, and prescribes the mode and manner in which the action shall be prosecuted. It directs that the action shall be brought by filing a petition or declaration and publishing the same at least once a week for four weeks in some newspaper in the county where the suit is brought, and prescribes what matters shall be set forth therein, including a notice requiring all persons interested in the lands to come into Court, on a day to be specified in said notice, and file their objections in writing, if any they have, against the proposed condemnation. At the time specified in the notice, or as soon thereafter as is convenient, the Court is required to impanel a jury to assess the value of the lands. The Board of State Examiners are directed to audit the amount so assessed, together with such expenses as the Attorney-General may certify, and the

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Controller is directed to draw his warrant for such amount in favor of the Attorney-General, payable on the 15th of December, 1863, who is required to pay the same into court for the benefit of all the parties interested in the proceedings. Upon the payment of the warrant or the money into Court the clerk is required to execute a deed of the land in question to the State of California in due form of law, reciting the proceedings in the case, and thereupon it is declared that the State shall thereafter be the owner in fee simple absolute of said lands.

Under this Act these proceedings were instituted on the 1st day of May, 1863, and thereafter the value of the lands was assessed and the money paid into Court pursuant to an order of the Court made on the 29th of February, 1864. This order reserved to the parties the right to take any further steps they might deem proper until the 12th of March following, on which day the Attorney-General moved the Court to refund the money to the State, and to quash all the proceedings upon the ground that they were null and void by reason of a non-compliance with the provisions of the Act under which they had been instituted. This motion was denied, and thereupon the Attorney-General took an appeal to this Court from all the judgments and orders in the case.

It appears from the record that the petition was filed in the names of Leland Stanford, Governor; John F. Chellis, Lieutenant-Governor; William H. Weeks, Secretary of State, and *ex officio* members of the Board of State Prison Directors of the State of California, instead of the People of the State of California, as directed by the Act in question. It further appears that the notice required by the Act was not published for four weeks, as therein directed prior to the day upon which the owners were required to appear in Court and answer the petition, but for twenty-four days only. There are other grounds upon which it is claimed that these proceedings are null and void, which we omit for the reason that the two already stated are sufficient to establish their invalidity.

In order to render proceedings of this character effectual for

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any purpose the provisions of the statute by which they are authorized must be strictly followed. The power must be exercised precisely as directed, and there can be no departure from the mode prescribed without vitiating the entire proceedings. (Sedgwick on Statutes, 319.) In *Bensley v. Mountain Lake Water Company*, 13 Cal. 306, the Court said: "All statutory modes of divesting titles are strictly construed, and to be strictly followed. He who relies for a title upon an extraordinary mode of acquisition given him, not by the will of the owner, express or implied, but against his will and by the mandate of the law, must show for his warrant a strict compliance with those statutory rules from which his title accrues." (See *Curran v. Shattuck*, 24 Cal. 427.)

The institution of this action in the names of the Board of State Prison Directors is wholly unauthorized by the Act in question; on the contrary, the Act directs it to be brought in the name of the People of the State of California. This alone is sufficient to render the whole proceeding a nullity. But had the action been commenced in the name of the proper party, the Court failed to acquire any jurisdiction over the owners of the land (except such as voluntarily appeared), for the want of a sufficient publication of the notice required by the Act in question. A publication for four weeks is required, yet the notice in this case directed the owners to appear on the 2d of June, and its first publication was on the 9th of May, less than four weeks before the day appointed for their appearance in Court.

The District Court did not lose its power or control over the case by reason of its adjournments at any time. It was unfinished business, and necessarily continued in Court until the deed was made and the money paid over under the order of the Court. It being apparent that the State would have acquired no title to the land in question by virtue of the proceedings in this case, it was the duty of the Attorney-General to quash the whole case before the money was paid out by the Court, and his motion to that end ought to have been sustained.

Points decided.

The proceedings being void, the State acquired no right to a deed, nor did the owners of the land acquire any right to the money. The order denying the motion is reversed, and upon the return of the case to the Court below, that Court is directed to enter an order quashing the entire proceedings, and directing the money now in Court to be refunded to the State.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* J. G. McCULLOUGH, ATTORNEY-GENERAL, *v.* ROMUALDO PACHECO, TREASURER OF SAID STATE, AND THE CENTRAL PACIFIC RAILROAD COMPANY OF CALIFORNIA.

POWER OF THE LEGISLATURE OVER TAXATION AND APPROPRIATIONS.—By the Constitution of California, the legislative department of the Government is vested with the power of taxation, and the authority to determine the objects for which the taxing power shall be exercised, and to appropriate the moneys thus raised to such objects; and there is no restriction upon this power as to the objects to which, or the time for which appropriations may be made, except that "no appropriations for a standing army shall be for a longer time than two years."

APPROPRIATIONS — WHEN DO NOT CREATE STATE DEBT.—There being no limitation in the Constitution in respect to the time over which legislative appropriations may extend, a law which appropriates a sum or sums of money for the future, and directs certain payments to be made out of the same at designated periods, from year to year thereafter, and which also imposes a special tax and sets apart the proceeds thereof to constitute a fund sufficient to meet the sums so appropriated and directed to be paid, as the same become payable, does not create a debt within the meaning of the prohibitory clause in Article VIII of the Constitution of the State of California.

CREATION OF STATE DEBT IN CASE OF WAR.—The legislative department of the State Government has the exclusive right to determine when such a state of war exists as will authorize it to create a debt to repel invasion or suppress insurrection, without submitting the law creating the debt to the people; and its determination upon this subject is not subject to review, or liable to be controlled by the judicial department.

LEGISLATIVE DETERMINATION WHEN WAR EXISTS.—The passage by the Legislature of an Act creating a debt for the purpose of repelling invasion or suppressing a rebellion, without a submission of the question to a vote of the people, which Act recites in its preamble the existence of war, and refers in the body of the Act to such recital for the reasons which operated upon that body to induce the passage of the Act, is evidence of a determination by the Legislature that the exigency justifying its action in creating the debt has arisen.

AID TO A RAILROAD CORPORATION BY THE STATE.—Section ten of Article XI

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of the Constitution, prohibiting the State from giving or loaning its credit to or in aid of a corporation, does not prohibit the State from appropriating its funds, in time of war, to aid a corporation in the construction of a railroad to be used by the State for military purposes.

GIFT OR LOAN OF THE CREDIT OF THE STATE TO A CORPORATION.—The imposition of a special tax, and an appropriation of the proceeds of the same to be paid, when collected, to a railroad company, or its creditors, to aid in building the railroad, in consideration of valuable services to be rendered thereafter to the State by the corporation, is not a gift or loan of the credit of the State to or in aid of a corporation, within the meaning of section ten of Article XI of the Constitution.

FINAL JUDGMENT ON BILL TO OBTAIN INJUNCTION.—Where a bill is filed by the people on the relation of the Attorney-General to enjoin the State Treasurer from paying money out of the Treasury, on the ground of the unconstitutionality of the Act directing the Treasurer to make the payment, and the Court on the final trial deny the injunction, the judgment denying the injunction should not contain a clause adjudging and decreeing that the Treasurer pay over the money as required by the law.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The following are copies of the complaint, answers, judgment, and stipulation in this cause:

The People of the State of California, on the relation of John G. McCullough, Attorney-General of said State, complain of the defendants, Romualdo Pacheco, Treasurer of said State, and the Central Pacific Railroad Company of California, a corporation duly incorporated under the laws of and doing business within said State, and for cause of complaint aver and show and cause this Court to be informed, that the said railroad company, defendant, assuming to act under a pretended statute of the Legislature of said State, approved April 4th, 1864, and entitled "An Act to aid the construction of the Central Pacific Railroad, and to secure the use of the same to this State for military and other purposes, and other matters relating thereto," have executed and issued, or are about to issue, fifteen hundred bonds, numbering from one to fifteen hundred inclusive, for the sum of one thousand dollars each, with forty interest coupons, each for thirty-five dollars, attached to each of said bonds, and that the following is the form and copy of one of said bonds, viz:

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"UNITED STATES OF AMERICA.

"No. —.

"The Central Pacific Railroad Company of California acknowledge themselves to owe to Oakes Ames, of North Easton, in the State of Massachusetts, or to the holder hereof, the sum of one thousand dollars, which sum they promise to pay to the holder hereof, in the City of New York, on the 1st day of July, 1884, with interest thereon at the rate of seven per cent per annum from the first day of July, 1864, payable semi-annually, on the first day of January, 1865, and on the first days of July and January of each year thereafter, at the State Treasury of the State of California, in the City of Sacramento, in said State, upon the surrender of the annexed coupons to the Treasurer of said State, both principal and interest payable in *United States gold coin*, at par dollar for dollar—this bond being one of fifteen hundred, numbering from one to fifteen hundred inclusive, of the same tenor, amount, and date, issued under and in pursuance of an Act entitled 'An Act to aid the construction of the Central Pacific Railroad, and to secure the use of the same to this State for military and other purposes, and other matters relating thereto,' approved April 4th, 1864, and by the provisions of said Act, the interest thereon is to be paid by the State of California. The payment of the principal and interest of this and said other bonds is also secured by a mortgage executed by the said company upon the whole of their railroad from the City of Sacramento to the eastern boundary line of the State of California, and all the rolling stock, fixtures, and franchises thereof, to Edgar Mills, of Sacramento, State of California, and Joseph A. Donohoe, San Francisco, State of California, as trustees for the holders of such bonds and coupons. The payment of said bonds is also secured by a sinking fund, provided by setting apart in the year 1870, and each year thereafter, from the net earnings and income of the railroad of said company, the sum of fifty thousand dollars in trust, to be loaned out on interest, which sums, with the accumulating interest thereon, are irrevocably pledged to the holders of said bonds for the final payment and

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redemption thereof. And it is hereby stipulated and conditioned that the City and County of San Francisco, and the Counties of Sacramento and Placer, in the State of California, shall not be liable for any of the debts or liabilities of said company to an amount beyond or exceeding the amount of the capital stock of said company subscribed, or which may hereafter be subscribed by them, or either of them, upon the books of said company.

"In testimony whereof, the said company have caused their corporate seal to be hereunto affixed, and the same to be signed by their President and Secretary, this first day of July, 1864.

"L. STANFORD, President.

[SEAL] "E. H. MILLER, Jr., Secretary."

And said plaintiffs further complain, and cause this Court to be informed, that said defendant Pacheco, assuming to act solely by virtue of the provisions of said pretended statute, and pretending to act in his official capacity as Treasurer of said State, and to bind the people thereof, has signed or is about to sign each of said forty interest coupons attached to each of said fifteen hundred bonds, and that the form of one of said coupons attached as aforesaid, being the coupon first falling due thereon, and the other thirty-nine coupons being of like tenor, except that they fall due in regular order every six months after the first day of January, A. D. 1865, and also that the form of the indorsement on the back of said coupons signed by said Pacheco as said Treasurer, is as follows, viz:

"§35. Central Pacific R. R. Co. of California.

"Coupon No. 1.

"For thirty-five dollars in U. S. gold coin, due January 1, 1865, payable by the State of California, at the State Treasury.

"For Bond No. —.

"E. H. MILLER, Jr., Secretary.

"This coupon is payable by the State of California, under an Act entitled 'An Act to aid the construction of the Central Pacific Railroad, and to secure the use of the same to this

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State for military and other purposes, and other matters relating thereto,' approved April 4th, 1864.

"R. PACHECO, State Treasurer."

And the Attorney-General, further informing on behalf of the People aforesaid, avers that it is the intention of said railroad company, defendant, still assuming to act under the provisions of said pretended statute, and they so declare it openly to be their intention to demand of and from the defendant Pacheco, as Treasurer aforesaid, the payment in pursuance of the tenor thereof, of the said fifteen hundred coupons attached to said bonds which fall due on the said first day of January, 1865, amounting in all to fifty-two thousand five hundred dollars, in the gold coin of the United States, and to demand of said Treasurer and his successors in office the payment of the said other coupons attached to said fifteen hundred bonds as they severally fall due, amounting in all, together with said first coupons, to the sum of two million one hundred thousand dollars, in said gold coin.

And further informing on behalf of the People aforesaid, the Attorney-General avers, that defendant Pacheco, pretending to act in his capacity as Treasurer as aforesaid, threatens and declares it to be his intention to pay out of the State Treasury, in said United States gold coin, on the 1st day of January, 1865, the said amount claimed by said railroad company as aforesaid, to be then due as interest on said fifteen hundred bonds, and also in like manner while he remains in office, he declares it to be his intention to pay said other coupons out of the State Treasury as they severally fall due as aforesaid, claiming and pretending to make such payments, and that the same are authorized, and the said company defendant, claiming and pretending to receive said moneys, under the provisions of said pretended Act of the Legislature.

And the Attorney-General, in behalf of the People aforesaid, avers and charges, that said Pacheco, as such State Treasurer, will carry out his threats and continue to sign said coupons, and will pay said coupons out of the moneys in the State

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Treasury now under his control as such Treasurer, and the said company defendant will receive said payments from said moneys, unless they and each of them are restrained and enjoined from so doing by the order and injunction of this Court.

And the said Attorney-General further informs the Court that he is advised and so charges the fact to be, that the said pretended Act of the Legislature (by virtue of which solely said defendants are now assuming and claiming to act and intend further to act under its provisions,) is wholly unconstitutional and void, and utterly and entirely inoperative and of no valid force so as to authorize or empower said defendant company to execute and issue said fifteen hundred bonds with the coupons attached in the form aforesaid, or to authorize or empower them or any other parties to receive payment of said coupons or any part thereof out of any moneys now or that may hereafter be in the State Treasury, and that said pretended Act confers no valid power or right to exercise the duties or authority in the same attempted to be created and delegated to the said defendants as aforesaid by reason of this:

That notwithstanding long before, and at the time, and ever since the passage of said pretended Act, the State of California was and is indebted in a sum greatly exceeding the sum of three hundred thousand dollars upon debts and liabilities created by the Legislature thereof, no sufficient ways or means, exclusive of loans, were provided by said Act for the payment of the debt and liabilities therein attempted to be created as the same falls due and for the full discharge thereof within the next twenty years.

And for this: That though the public debt of the State before, at the time, and ever since April 4th, 1864, over and exclusive of the amount sought to be appropriated by said pretended Act, was far exceeding three hundred thousand dollars, yet the said pretended Act did not provide for its submission to the people of the State, nor has the same in fact been submitted nor attempted nor pretended to be submitted to said people, nor has said pretended Act ever received at any general elec-

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tion a majority of all the votes cast for or against it by the people as such general election.

And for this: That though upon April 4th, 1864, and since the indebtedness of the State as aforesaid exceeded three hundred thousand dollars, yet said pretended Act was not passed, nor the liability upon the State therein contemplated was not nor is attempted to be contracted during a time or in the case of war to repel invasion or suppress insurrection—that in fact neither then nor since, were or have the people of this State been engaged in any war for repelling any invasion or suppressing any insurrection against its authority.

And for this: That said pretended Act attempts to give and to loan the credit of this State in some manner to and in aid of said Central Pacific Railroad Company of California, a corporation duly organized under the laws of said State.

Wherefore, the said Attorney-General avers, that all the acts already performed by said Pacheco, Treasurer as aforesaid, in behalf of the people and intended to be hereafter performed by the defendants under the said provisions of said pretended Act, were and are and will be wrongful and illegal, and utterly in violation of law, and all liabilities and payments contracted and made, or to be contracted and made, and all moneys paid or to be paid out by said Pacheco, or received or to be received by said company defendant, or any holder of said coupons, under the said provisions of said pretended Act, are and will be illegal, wrongful, and fraudulent against the people of the State of California.

And the Attorney-General further informing, gives the Court to know, that if the defendant Pacheco is permitted to continue to sign and issue said coupons or pay out of the State Treasury said moneys, and the defendant company to negotiate said coupons or to receive said moneys, the said people must suffer great, serious, and irreparable injury and loss thereby.

Wherefore, inasmuch as the said people have no speedy, adequate, nor complete remedy by the course of the common law for the injuries committed and threatened to be committed by the said defendants and others hereinbefore set forth, they

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pray this Court by the final judgment thereof, and in the meantime until the rendition of such final judgment, that said R. Pacheco, Treasurer of said State of California, and the said Central Pacific Railroad Company of California, their and each of their counsel, solicitors, agents, attorneys, and employes, may be restrained by the order and writ of injunction of this Court from doing any act or acts under the said provisions of said pretended statute, and especially that said defendant company be restrained from executing and issuing the said fifteen hundred bonds with the coupons attached in the form above recited, and if already executed, that the same may be cancelled, and the defendant company restrained from proceeding any further in the issuance or negotiation thereof,) and that said defendant Pacheco be restrained from signing said coupons (and if any or all are already signed, that the same may be cancelled and he be restrained from delivering them to said company or to any other,) and especially that said Pacheco be perpetually restrained and enjoined from paying out any of the moneys of the State Treasury under his control, in liquidation of said coupons to said company or to any other, under the provisions of said pretended Act of the Legislature, and that said company be forever restrained and enjoined from collecting or receiving any of said moneys on said coupons or otherwise—and be forever restrained from enforcing or attempting to enforce the payment of said coupons, or any of them, or any part thereof, from the State Treasury, or any moneys therein—and that such other orders and decrees, interlocutory and final, may be made herein, as to equity may pertain, and that such other relief as is proper may be granted.

JOHN G. McCULLOUGH,
Attorney-General.

The said defendants, the Central Pacific Railroad Company of California, a corporation duly organized under the laws of the State of California, for answer to the complaint filed in said action, deny that the said statute described and referred to in said complaint is unconstitutional or void, but on the

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contrary they aver that the same is a valid statute, and does not violate any provision of the Constitution of the State of California, or of the United States, and the said statute fully authorizes the execution and issue of the said bonds and coupons described in said complaint, and also authorizes and requires the payment of said coupons by the Treasurer of said State of California, out of the moneys in the State Treasury, and in his hands as such State Treasurer; that it was not necessary, or does the Constitution of the State of California require, that said statute should be submitted to the people of said State at any election held in said State; and they further aver that said statute was passed in a time of war, to repel invasion, and suppress insurrection, as set forth in said Act and the preamble thereof; that at that time, and ever since, the United States were and have been engaged in a war with certain persons who have rebelled against the authority of the Government of the United States, of which the State of California forms a part, and the National Government was at said time and ever since has been engaged in suppressing a gigantic insurrection of a portion of the people of the United States against its authority, and the said Act was passed by the State of California "to repel invasion, suppress insurrection, and defend the State against its enemies," and the Legislature of said State had full power and authority to enact said law, and it is the duty of the officers of said State to enforce the same, and give full effect to all its provisions.

The said defendants further say, that they have fully and faithfully complied, in all respects, with the provisions, requirements, and conditions of the said Act, on their part therein provided to be performed; that within ninety days after the passage of said Act, to wit: on the 4th day of May, 1864, the said defendants duly filed in the office of the Secretary of State, a contract and agreement, duly signed by the President and Secretary of said company, and sealed with the corporate seal thereof, therein and thereby agreeing to faithfully do and perform, and fully comply, on the part of said company, with all the terms and conditions set forth in said Act, and the fourth

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section thereof, and therein also releasing all claim to the warrants provided to be issued by the Act entitled an Act to aid the construction of the Central Pacific Railroad in the State of California, and other matters relating thereto, approved April 25, 1863, and also agreeing therein that said company should, within ninety days after the receipt of a patent therefor from the United States, execute, acknowledge, and deliver to the State of California, a deed in fee simple for the conveyance of the south half of section nineteen, in Township Eleven north, of Range Seven east, Mount Diablo meridian, situated in Placer County, on said railroad, and about twenty-two miles from Sacramento, with all the granite and granite quarries thereon, excepting and reserving therefrom, however, a tract or strip of land four hundred feet wide, and running across said half section, each one half thereof lying on each side of the line running along the centre of the main railroad track of said company, and the said company has never received a patent for said tract of land.

And the said Central Pacific Railroad Company of California further aver, that the passage of said Act by the Legislature of said State, and the acceptance of the terms, conditions, and provisions thereof by these defendants, by filing said contract and agreement in the office of the Secretary of State, as provided by said Act, constituted and made a valid, legal, and binding contract between the State of California and these defendants, and the payment of said interest coupons of the said fifteen hundred bonds, described in said complaint, by the State Treasurer, out of moneys in the State Treasury, is and will be but the payment and discharge of a just, valid, and binding liability of the State of California, arising under a valid, subsisting obligation and contract, on the part of said State, as a just, proper, and agreed compensation for the services and transportation of property done and performed, and agreed to be hereafter done and performed, by these defendants, for the use and benefit of said State of California.

Wherefore, these defendants have good right to demand and receive the payment of said interest coupons on the said fifteen

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hundred bonds described in said complaint, from time to time, as the same shall fall due, to be paid by the said Pacheco as such State Treasurer, and his successors in said office, out of moneys in the State Treasury, and the said State Treasurer, and his successors in said office, has full power and authority, and it is his and their duty to pay the same, as they shall from time to time become due, under and in accordance with the provisions of the said statute.

Wherefore, these defendants pray judgment that the said defendant, R. Pacheco, as such State Treasurer, and his successors in said office, be ordered and directed to pay to the holders thereof, the said forty interest coupons attached to each of the said fifteen hundred bonds described in said complaint, as the same shall respectively fall due, out of moneys in the State Treasury, as provided in the said statute described and referred to in said complaint, and for their costs herein expended, and for such other and further relief as may be just and proper.

E. B. CROCKER,
Attorney for Central Pacific R. R. Co. of Cal.

The said defendant, Pacheco, for answer to the complaint filed in said action, denies generally and specifically each and all the allegations in said complaint, except that he admits that he is State Treasurer, and that, as he is informed and believes, the said Act of the State of California described and referred to in said complaint, is a valid and binding statute, and the same authorizes and requires this defendant, as such State Treasurer, to pay the said coupons attached to said bonds described in said complaint.

Wherefore, he prays for judgment, etc.

E. B. CROCKER,
Attorney for Pacheco.

October Term, A. D. 1864. Judgment, November 25th, 1864.

This cause, having been duly submitted to the Court for trial,

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upon the pleadings and stipulation filed, the Court now finds for said defendants, and that said Central Pacific Railroad Company is entitled to a judgment as prayed for in their answer.

It is therefore ordered, adjudged and decreed, that the injunction against said defendants prayed for in the complaint filed in said action be and the same is hereby denied.

And it is further ordered, adjudged, and decreed, that the said Romualdo Pacheco, State Treasurer of the State of California, and his successors in said office, be, and they are hereby ordered and directed to pay to the holders thereof, the said forty interest coupons attached to each of the said fifteen hundred bonds described in said complaint, and numbering from one to fifteen hundred, inclusive, said interest coupons being for thirty-five dollars each, payable in United States gold coin, the same to be paid from time to time as the said interest coupons shall respectively fall due, out of the State Treasury, and the moneys and funds therein, in accordance with the provisions of the Act entitled "An Act to aid the construction of the Central Pacific Railroad, and to secure the use of the same to this State for military and other purposes, and other matters relating thereto," approved April 4, 1864.

It is hereby stipulated and agreed by and between the above named plaintiffs and defendants, that this case shall be heard and determined in the Supreme Court upon the pleadings, the judgment and this stipulation, and it is further agreed and admitted, that the facts stated in said complaint and not denied in the answer of the Central Pacific Railroad Company of California, are true; and further, it is admitted that the averment of facts in said answer of the said company are also true, except that it is not admitted as a matter of fact, that, at the time of the passage of the Act of April 4, 1864, mentioned in said pleadings, or since, the said State (though it is that the

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General Government) was engaged in any war, or repelling any invasion, or suppressing any insurrection.

(Signed,)

J. G. McCULLOUGH,
Att'y-Gen'l and for Plaintiffs and Appel'ts.

(Signed,)

E. B. CROCKER,
Attorney for Defendants and Respondents.

The other facts are stated in the opinion of the Court.

J. G. McCullough, Attorney-General, for Appellant.

The Act in question violates Article VIII of the State Constitution. The Legislature have attempted to create an unconstitutional debt.

It is admitted that the Act was never submitted, nor is there any provision in the Act itself for its submission, to a vote of the people. It is admitted that the debt of the State, upon April 4th, 1864, and ever since, has and does greatly exceed three hundred thousand dollars.

We maintain, first, that the law attempts to create a debt; and, second, that it does not come within the exception of the Article. And preliminarily we remark that the doctrine that this Article is merely directory or advisory, and addressed solely to the legislative conscience, and not mandatory upon the Legislature, has long since been abandoned. (*People v. Johnson*, 6 Cal. 504; *Nougues v. Douglass*, 7 Cal. 68, 76.)

First—The Act assumes to authorize the creation of a State debt or liability.

The VIIIth Article of the Constitution is plain, and clear to the obscurest understanding. The terms are general and comprehensive. The Legislature is forbidden to create "any debt." A debt may be contingent or absolute, created by statute expressly or by contract, by appropriation when there is no money to meet it, (at least within the current fiscal year,) by drawing against a fund when none such exists, and in various other ways. But lest a narrow construction should be placed upon the word "debt," and an attempt made to except from its meaning some kind of a State obligation, the

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Legislature is forbidden to create "any liability," direct or indirect, present or future, express or implied. And that there might be no possible evasion, the Legislature is forbidden to create any debt or debts, liability or liabilities, "*in any manner.*"

But it is said that this Article was not intended to include the necessary and ordinary expenses of the Government. Such a construction is negatived by the debates in the Constitutional Convention, by the very words of the Article, by the exception in cases of war, and by the sixteenth section of Article XII. The debates in the Convention show (and surely the framers should know what they meant) that the Article was intended to cover governmental expenses. It was the very subject discussed, some contending for one hundred thousand dollars, some for five hundred thousand dollars, and finally the Convention settled on three hundred thousand dollars as the full limit the Legislature was permitted to go in the creation of a State debt, unless the same was submitted to a vote of the people. The three hundred thousand dollars was intended as a margin, after the State Government was fairly put in operation under the sixteenth section of Article XII, to meet any deficit occasioned by the miscalculations of subsequent Legislatures in framing their tax and appropriation bills, in the failure of the usual sources of revenue, etc. (Debates in the Convention, p. 165; *People v. Johnson*, 6 Cal. 501; *State v. Medbery*, 7 Ohio, 532.) Nor do the words of the Article warrant any such exception; and nothing but a forced and strained reading can draw such a construction from the terms.

But the exception in cases of war, invasion, and insurrection, shows also that the framers thought that unless the exception was made the words would include such expenses; and if one exception be expressly made, why not make others, if such were intended? "If the general limit would not include these ordinary expenses of the State, why should the same general rule include the more pressing demand in time of war?" (*Nouques v. Douglass*, 7 Cal. 67.)

And again, Article XII, section 16, answers this objection.

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The Convention, acknowledging the force of such an objection when applied to the first Legislature, which was to put the Government in operation, which would be without any means in the Treasury to defray the expenses, and before any revenue could be collected, which must therefore borrow to obtain the means; and, judging that the power to borrow only three hundred thousand dollars might not be ample enough to meet all the governmental expenses, expressly provided that the limitation contained in the VIIIth Article should not extend to that Legislature, but it was authorized to "negotiate for such amount as might be necessary to pay the expenses of the State Government."

We urge, then, that this Article is not simply a limitation upon the power to borrow money, but that it includes liabilities of every nature which may be "in any manner" created by the Legislature; and that the powers of taxation and appropriation are incident to the power of creating a debt or liability.

But grant that this construction is too broad, (for it is not necessary in its full scope to sustain our case,) we particularly present another view. The Constitution establishes a State Government; machinery is provided for its organization; its powers are divided into three separate departments; these departments are to be filled with officers to exercise the powers and functions appertaining to them; salaries are provided to be paid to them; executive, judicial, and legislative officers are to receive compensation; (Art. V, Sec. 21; Art. VI, Sec. 15; Art. XII, Sec. 15, of the Const. ;) other strictly governmental expenses are provided to be incurred.

The VIIIth Article prohibits the *Legislature* from creating any debt or liability. But the foregoing liabilities are created by the *Constitution*, not by the Legislature. They are created by the very instrument that creates the VIIIth Article itself.

These provisions must stand and be construed together. Each must have its effect. The Convention that framed, the people who adopted the VIIIth Article, framed and adopted the Vth, VIth, and XIIth Articles. The "debt or liability"

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inhibited by that Convention and the people, to be created against the State by only *one* of the departments of the proposed government was created by the Convention and the people themselves, at the same time, and by the same act, for the purpose of the successful organization and subsequent operation of *all* the departments of that proposed Government. In other words, the debts or liabilities inhibited in the VIIIth Article must have their sources not within, but outside of and beyond, the Constitution. With the former that Article has nothing to do. To use the words in a peculiar sense, it forbids the creation of *legislative*, but not *constitutional* debts.

But, though it be true that the Constitution creates liabilities of a character above enumerated, it nowhere provides that the State shall go into a system of internal improvements, or launch out into any scheme of financial speculation. (*State v. Medbery*, 7 Ohio, 536.)

And if it be said, as it was in *The State of California v. McCauley*, 15 Cal. 455, that any or all of the considerations mentioned in section four of the Act in question, viz: the transportation of convicts to the State Prison, of lunatics to the Insane Asylum, the conveyance of public messengers, of articles to the fairs of the State Agricultural Society, of materials for the construction of the State Capitol Building, of troops and munitions of war belonging to the State, etc., etc., are to be as much provided for, and it is as much the duty of the State to see to that provision as it is to provide for the salaries of her officers; and that the obligation of the State to pay the expenses of such conveyance and transportation exists with equal force and to the same extent, without as with the Act and so-called contract thereunder—it is answered: That a subsisting contract entered into by the State to pay for such conveyance and transportation, creating a present liability to pay specific sums of money semi-annually for the next twenty years, and a mere abstract constitutional obligation to perform said acts, and to pay the expenses of such conveyance and transportation, are obviously two different things: the one creates a direct liability for a specific sum of money

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to individuals; the other is a simple enunciation of one of the duties of a Legislature; the one creates a debt, the other is merely the announcement of a moral obligation addressed to the legislative conscience. (*State v. Medbery*, 7 Ohio, 537.)

It is argued that the Act is a contract between the State and the company, by which the former, in consideration of certain things performed and to be performed by the latter, agrees to pay the interest on these bonds for the next twenty years.

Because the Act may have the effect of a contract, does it any the less assume to create a debt? If A. contracts with B. to perform certain services, does or may not that contract create a debt against A.? The Legislature, not being prohibited, has the power to make contracts, and we will assume contracts of this character, but it must make them in compliance with and in subordination to the provisions of the Constitution. The power to contract is an incident to, if not inherent in, the power to create a debt or liability. Can there be any creation of a debt except by words of contract? If the power to do the former is limited, must not the power to do the latter necessarily be? And if a contract be entered into by which an individual advances money or services, or promises to advance either to the State, and the latter in return promises to advance money in satisfaction, is the consideration of the State any the less an inhibited liability under the VIIIth Article because of the different nature of the consideration advanced by the individual? There is no magic in the word "contract." The State being free from debt, the Legislature may, by contract, borrow *from* an individual three hundred thousand dollars, or contract to pay *to* him three hundred thousand dollars for certain services; but it cannot, therefore, borrow four hundred thousand dollars, or contract to pay four hundred thousand dollars for those services. Then, though the Act in question is in the form of a contract, and though the company thus far have complied with the conditions on their part, does it not assume to create an unconstitutional liability?

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Now the words "debt or liability," as used in the VIIIth Article, are general. A debt, as said before, may be absolute or contingent, express or implied, statutory or conventional, funded or unfunded. A debt exists where the State agrees to pay money in return for services or for money borrowed. It may exist though the principal is never to be paid. (3 Selden, 20; 1 Peters U. S. 216.) In a popular sense it includes all that is due to a party under any form of obligation or promise; (3 Metcalf, 526; 2 Blackstone's Commentaries, 464; Jacob's Law Dictionary, "Debt;" 20 Cal. 324;) any kind of a just demand; (4 Sergeant & Rawle, 506;) it may exist though there be no personal but only property liability; (*People ex rel. Mulford v. Mayhew*, 26 Cal. 665;) it may exist against the State, though it cannot be sued; (3 Selden, 93, 128;) in the meaning of this Article it is said to exist when a sum of money is due from the State by contract, express or implied. (20 Cal. 350.) Either of these definitions would embrace the liability created by the Act under consideration. The conditions fulfilled, the State agrees to pay absolutely fifty-two thousand five hundred dollars on January and July first of each year. And on the theory of the defendants, though the company should fail to perform its part of the contract hereafter, still this sum is due at stated times to the coupon holders, and the State must sue the company to recover back. There is, then, not only a contract to pay money for necessary expenses at a future day, on certain conditions, for services to be rendered or materials furnished, but there is an absolute agreement to pay money *in any event*, with an *immediate and a fixed liability* on the part of the State to pay it; and it is clearly, within even the argument of McCauley's counsel, in 15 Cal. 445, an inhibited liability. The sum is certain, the time is definite, the money is payable at all events. If the State was suable she would be liable to an action. In the words of section two, these "coupons for interest on said fifteen hundred bonds hereinbefore described shall be paid as they may fall due, from time to time, for said period of twenty years." Unlike warrants, which are merely a part of the

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machinery adopted by the Government in the settlement of its accounts, and upon which no action can be maintained, (*People v. Gray*, 23 Cal. 125,) these coupons are evidences of indebtedness, binding obligations, negotiable instruments, floating from hand to hand, separated from the bond, and upon which the bearer may sue. (*American Law Register* for Aug. 1863, 595; *Jackson v. Y. & C. R. R. Co.*, Note; *County of Beaver v. Armstrong*, 44 Penn. 63.) They are just as much liabilities against the State as are the bonds against the company. Warrants are payable out of "moneys not otherwise appropriated," and there is no obligation on the State to pay until there is money in the Treasury. In the State Prison case, "the appropriations were to take effect and the services to be rendered in future." "The State only became indebted as the services were each month performed," says Mr. Justice Field. But here the State is indebted, upon the issuance of these coupons, two million one hundred thousand dollars, and she promises to pay it in instalments, whether the eight cent tax yields enough or not, and service or no service on the company's part, say the respondents. The State is just as much indebted as would be an individual who had issued his promissory notes for that amount payable every six months for the next twenty years.

And even granting that the services rendered by section four are as much a part of the State's duty as to support her convicts, (which they are not,) the Legislature has no right to support convicts or pay Judges of the State by the issuance of bonds in this way.

Assume that the next Legislature should, in this same way, contract for building a Capitol, State Prison, etc., etc., and issue State obligations like these coupons to the amount of other millions of dollars. We are told it is not a State debt, because a tax is levied and an appropriation made — and tax of eight cents on the one hundred dollars for one purpose, five for another, ten for another, and so on. And respondents say these are *irrepealable*. If the Legislature can do this for twenty years, it can do it for all time; thus one Legislature may farm out the whole public revenue to these different purposes, and

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bind the people forever. For if a contract is thus created, a subsequent Legislature cannot repeal the law to affect the contract, nor can the people in Convention abolish their Constitution to affect it, as it is prohibited by the Constitution of the United States. (21 N. Y. 9; 22 N. Y. 9.) And yet we are told that a State debt is not created. Did not the national debt of England commence, and has it not grown in this very way; farming out first one and then another source of the public revenue? (*Newell v. People*, 3 Selden, 102, 115, 124; 13 Barb. S. C. 63, 188.)

The Act does not come within the exception of the Article which reads "except in case of war to repel invasion or suppress insurrection."

It is claimed that under this Article the Legislature is the exclusive judge when the contingency of war has arisen, and that by this law they have passed their judgment.

Is the Legislature the exclusive judge? May it enact war in time of profound peace? The actual existence of public war, and also of civil war, though never publicly proclaimed *eo nomine*, is a fact in our domestic history which this Court is bound to notice and to know. The Court does know judicially that the National Government is engaged in a civil war to suppress a gigantic insurrection against its authority. (2 Black, S. C., U. S., 667, Prize Cases.)

And does this Court not know judicially that upon April 4th last, or since, no war has existed in this State, no invasion to repel, no insurrection to suppress? Is it in the power of the Legislature to assume a state of war when, confessedly, none exists? This Article applies to a case of war wherein the *State* is engaged — to repel an invasion against *its* authority, to suppress an insurrection within *its* borders; not to repel the invasion of an enemy into Virginia, not to suppress an insurrection in South Carolina.

But granting that the Legislature is the sole and exclusive judge of the existence of the exigency; (*Martin v. Mott*, 12 Wheaton, 29; *Luther v. Borden*, 7 Howard, 44;) that it may incur an unlimited debt in case of existing war, and provide

for a probable or even a possible contingency of war at any time in future, the debt must be incurred to meet a *case of war*, and of *war only*. How is it with this Act? The debt is incurred for peace as well as for war purposes.

The preamble is no part of this statute. Where the words are clear, the preamble, like the title, is resorted to for no purpose. It is only to be looked at when the words are ambiguous. It cannot confer any powers *per se*. It can neither enlarge nor restrict the body of the Act. (*Edwards v. Pope*, 3 Scammon, 470; Dwarris on Statutes, *655; Sedg. Con. and Stat. Law, 55, etc.; 1 Story on Con., Secs. 459, 462.)

The history of this provision and of Article VIIIth is well known. They have been incorporated in most of the new, and the amendments to the old Constitutions of many of our sister States. They were intended to check that wild spirit of speculation that was bringing financial ruin on the country. They were, in part, intended to prevent our State from launching out into a system of internal improvements that had almost engulfed many of the older States in pecuniary embarrassments. Towns, cities, counties, and States, had felt the baneful effects of the universal rage for speculation. Everywhere in the Eastern States, examples of bankruptcy and repudiation could be seen; the legitimate result of loaning the public credit and contracting public debts to commence and carry on the construction of canals and railroads. States that had attempted to carry on these works in their own name, were forced to suspend, injuriously affecting State credit, depreciating all kinds of property, and bringing general stagnation in all departments of business. Other States sold out their public works, as a choice of evils, at an enormous sacrifice.

The State is prohibited from giving or loaning her credit, or directly or indirectly from becoming a stockholder in any corporation. Does she do either by the Act under consideration? We find little authority upon this question. A similar clause to that in our Constitution is incorporated in the Constitutions of Maine, New York, Pennsylvania, Maryland, Kentucky, Ohio, Indiana, Louisiana, Michigan, Iowa, Wisconsin, Minne-

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sota, and West Virginia, but we find no direct decision in the Courts of those States upon the construction of this provision. It has been, doubtless, thought by their respective Legislatures that the terms of the section were so broad as to defy legislative evasion, and the clause has been accepted and acted upon in its natural and comprehensive signification.

But it is argued that this Act is a contract, and that the State is but doing by this contract what she is constitutionally bound to do, viz: providing for transporting her convicts.

Again we answer, that if this section is violated in the creation of a contract, the Act is none the less unconstitutional, and the State must enter into contracts in such a manner as not to loan or give her credit. And if it be a constitutional duty and a part of the legitimate functions of the Government to provide for carrying her lunatics, etc., that duty and function must be performed also in such a way as not to use the State credit. And again we urge, that there is a great difference between a mere abstract constitutional obligation addressed to the Legislature and an absolute and specific loan or gift of the State credit.

And so, too, it is said no credit is loaned, that appropriations are made to pay for services as rendered; and we again answer, ordinary appropriations are met by warrants payable only as money may come into the Treasury; but under this Act coupons are issued payable at all events at specified times—the one represents cash, the other credit.

Credit is defined to be "the selling of goods, 'or services,' or the transfer of property, in exchange for a written or implied promise of payment at a future time"—Worcester; to be "faith reposed, conferred, or bestowed; trust, confidence in, reliance on the honor or fidelity; reputed integrity or fidelity"—1 Richardson's Dic.; "the debt due in consequence of a contract, is also called a credit"—Bouvier's Law Dic. (See, also Mill's "Principles of Political Economy," Vol. 2, Ch. 11; Colwell's "Ways and Means of Payment," 2d Ed. Ch. 7.)

Now it is the confidence, the trust reposed in the State's fidelity and ability to pay these coupons every six months dur-

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ing the next twenty years, that makes them salable. It is the credit of the State which this company is authorized to make use of to render its obligations more valuable. The credit of the State is represented by these coupons just as though she were to issue her bonds and put them upon the market to pay the debts of this company. The State is bound to redeem these coupons, to pay this interest, as the same falls due.

Suppose this company, at any time in the future, fails in the performance of the conditions imposed on it by the fourth section, the respondents claim that the State must still go on and pay these coupons; and under the last clause of that section must sue to recover back the moneys paid. Then, is not the State made a guarantor? She is pledged to pay what are really and virtually the debts of this company. The contract is broken by the company in June—she has no right to look to the State to pay these coupons in July; they are a debt of the company, but the company refuse to pay; the holders present their coupons on July 1st, at the Treasury, and claim payment, as the State has guaranteed their payment in any event, and it was a reliance upon that guaranty—a faith in the credit of the State—that influenced them to purchase these obligations. And can the State deny that she is a guarantor? She must pay the fifty-two thousand five hundred dollars on July 1st, though she sue on July 2d to recover it back; and so she must continue to pay these coupons every six months for the next twenty years, though, confessedly, the company shall not pretend to fulfil any of the statutory conditions on her part. The State has guaranteed the payment of the company's debt—the principal fails to meet its obligations—the guarantor pays. (*The People v. Denniston*, 23 N. Y. 251.)

And so here the company claim that in any event these coupons have a valid existence, and that the holders are legal creditors of the State, and if so, we claim that the credit of the State is virtually loaned, and should the State fail to recover back anything from the company, the State's credit is given away. And it may have been for the very object of

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preventing such schemes as this that this clause was incorporated in the Constitution. Fearing lest the VIIIth Article might not fully accomplish their purpose, lest legal ingenuity might by some device attempt the creation of some kind of a contingent liability in substance though not in form, by the State guaranteeing the obligation of others, the framers inserted this section absolutely prohibiting a loan or gift of State credit in any manner. And if written Constitutions can be construed away and be evaded in the manner attempted by this Act, there is little use of them. It is worse than an open attack, for beside producing the same injurious results upon the State, such insidious and ingenious subterfuges are deadening to the moral sense of the Legislature and the people.

And, finally, we insist that this law is contrary to the spirit, intent, and policy of the Constitution; for, though it may be questioned, we think a Constitution may have a declared policy; (*Patterson v. Board of Supervisors, etc.*, 13 Cal. 182; *Chase v. Miller*, 41 Penn. 426); and that it is a policy of our Constitution, as gathered from Article VIII, and Article XI, tenth section, and other provisions, to keep the State free from debt, to keep it away from the schemes of internal improvement which have nearly wrecked sister States, to keep its people from being a tax-ridden and a debt-burdened people, to keep the Government within its legitimate sphere and to the performance of purely governmental functions.

Speaking of these clauses, Mr. Justice Baldwin says: "The intent is plain enough; they were designed as a check on legislation, and such legislation as might create a charge upon the property of the entire State." (13 Cal. 183.) They were intended to put it out of the power of the Legislature to burden the people with debt and taxation, as had been the case with other States; to protect them from the delusions, embarrassments, and onerous charges to which others or they in other States had been subjected. It was not merely the terms "debt" and "credit," not merely the shadow, but the substance, they were contending and providing against. It was not the particular form in which the liability might be incurred,

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nor whether it took the shape of coupons or bonds, whether payable as interest or principal, in instalments or at one time, under one guise or another; it was designed to give every citizen a broad guaranty in the fundamental law that no debt was to be contracted beyond the prescribed limit in any way; that the State credit was not to be loaned or given in any manner which might either presently or ultimately involve taxation, and to secure them, until in their sovereign capacity they saw proper to revoke it, a sure and certain constitutional protection against the unwelcome visits of the tax gatherer, calling for money to pay such liabilities and to redeem the plighted faith of the State, that these provisions were written in the organic law. And as it has been said, if the Legislature may so easily evade these wholesome restrictions by such and similar laws as that under consideration, a debt to any amount may be contracted for a prohibited purpose, the credit of the State without limit may be pledged under its authority, and the consequent burdens imposed upon all the property and people of the State, subjecting them to the same oppressive taxation and exacting charges as though Article VIII and section ten of Article XI were stricken from the Constitution.

This is but the first evasion; it is attempted to be sustained under the guise of a contract purporting to be supported by a consideration which it is sheer nonsense to pretend is or was thought to be adequate, or that it was introduced by its author for any other purpose than to leap over or crawl under the barriers of the Constitution. This bill is but the entering wedge, and if permitted to be driven in by this Court, it will be followed by others that will eventually rive open the saving clauses of the Constitution. The public records of the State show that a sister scheme to this received its death at the veto of the Governor, while this was only wounded. Heal it, and it will be prolific of legislative progeny. These provisions will thus fail wholly to effectuate their manifest and substantial objects, and all their boasted protection be reduced to a mere myth.

It is, then, from the history of the times, and from the occa-

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sion which brought about these limitations of power, from the plain intent as well as from the text, that we would read the Constitution to arrive at their true import; and in conclusion, we adopt the words of Mr. Justice Denio, *arguendo*, in *Newell v. The People*: "If the plausible language in which this Act is clothed is but a disguise too transparent to deceive the organs of legal vision — if, in substance and effect, distinct and clearly expressed constitutional provisions of great importance have been disregarded and set at naught, then this Court has no choice, no alternative, but to pronounce the measure null and void. Responsibility for consequences belongs to those who passed the bill. The Constitution was their commission, equally as it is yours, and if the same care and skill had been employed to discover the sense and follow the mandates of that instrument, which appear to have been exercised in order to evade it, no public interest would have been for a moment in jeopardy," and no unjust and illegal taxation levied upon the people of the State; and the people will learn that the limitations in the Constitution are a shield for their protection, and not a snare for their oppression.

E. B. Crocker, for Respondent.

The Act provides for the issue of the bonds of the company, and not of the State, and the bonds in question are company, and not State bonds.

The law merely provides for the payment of the *interest* of these bonds, by the officers at the State Treasury, from a special fund raised by a special tax for that purpose. Properly speaking, therefore, *no State debt is created* by the law, but provision is made merely for the payment of the interest *on a debt of the company*. There is a levy of a tax and an appropriation of money, but no creation of a State debt.

A case very similar in many points to the present, involving the same questions raised here, has already been passed upon by the Supreme Court of this State, and the validity of a contract entered into with the State, fully sustained in long and

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able opinions. We refer to the cases of *The State v. McCauley*, 15 Cal. 454; *McCauley v. Brooks*, 16 Cal. 12.

In the first case, it was contended that the contract, which provided for monthly payments to be made as the services were rendered, created a State debt, and was therefore unconstitutional.

But the Court say: "The appropriations are to take effect, and the services are to be rendered in future. *Until the services are rendered, there can be no debt on the part of the State.*"

But the Act is also within the exception of the Eighth Article.

It was passed in a time of war, as a war measure. The preamble states fully the reasons of its passage. The Legislature state explicitly that the exigency had arisen which was provided for by the exception to Article VIII. They were the sole judges of the question whether this exigency had arisen or not, as was decided by the Court in *Franklin v. Board of Examiners*, 23 Cal. 174; *Luther v. Borden*, 7 How. U. S. R. 1; *Martin v. Mott*, 12 Wheaton, 19.

The Legislature having thus decided that the case had arisen which called for the exercise of the power to create a State debt, within the exception to Article VIII, they had the clear and undoubted right to add to the State debt if they saw proper. The restriction upon the power being removed, by the existence of war in fact, the Legislature was free to act as its judgment might dictate, being responsible only to the people.

But the fact that war existed, does not depend entirely upon the preamble to the Act. It is shown by the public history of the times, by various Acts of Congress, and the proclamations of the President, of all which this Court takes judicial notice. (*Franklin v. Board of Examiners*, 23 Cal. 176.)

We think the conclusion is clearly established, that the law in question does not violate the Eighth Article of the State Constitution.

It is further urged that the Act violates the following portion of section ten of Article II of the State Constitution, to wit: "*The credit of the State shall not in any manner be given*

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or loaned to or in aid of any individual, association, or corporation."

The word "*credit*" is evidently here used as the opposite of *debt*. The passage means that no debt shall be created to make a gift or loan to or in aid of any individual, association, or corporation. If no *debt* is created, no *credit* is used. I have already shown that no debt is created, and therefore no *credit* is used. As was said by the Court, in *Patterson v. Supervisors of Yuba County*, 13 Cal. 183: "The same argument which denies force to this proposition, that this is a State debt, equally refutes the idea that it is a loan of State credit."

As already shown, the Act is a *contract* between the State and the company. The provision for making the payments under the contract is merely an appropriation of money to be paid in future, out of the Treasury, like any other expenditure for purposes necessary for all Governments. It is an appropriation of money for the payment of a liability arising under a contract, which accrues from time to time. No credit is given or used, but merely payments made.

It is evident that this clause does not mean that the Legislature may not *give* away or *loan* the money or property of the State. If it does, then a large portion of heretofore unquestioned legislation is void. The numerous relief bills, donations to charitable societies, and meritorious individuals, would all be void.

The Constitution leaves the Legislature free to use and dispose of the public money and property as they please, but they must not use the *credit* of the State, or incur a *debt* in so doing. Such bills merely appropriate the public money after it is received into the public Treasury, and therefore they are not void. So the law under consideration merely appropriates the public money after its receipt into the Treasury.

A law providing for raising money and appropriating the same to build a State Capitol, or any other law of like character, would be equally liable to this objection as the present Act.

Under the Act, not only no *credit*, but no money is *given* or

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loaned to the company. Money is paid to them for services rendered, under a valid contract.

The mere fact that the payments made under the contract afford incidental *aid* to a great work of internal improvement, renders it none the less a valid contract. Nor does it render it liable to any constitutional objection which does not lie equally against all contracts made by the State.

By the Court, SAWYER, J.

At the last session of the Legislature, an Act was passed, which was approved on the 14th of April, 1864, entitled, "An Act to aid the construction of the Central Pacific Railroad, and to secure the use of the same to this State for military and other purposes, and other matters relating thereto." (Laws 1864, p. 344.)

The preamble to said Act is as follows, viz:

"Whereas, War now exists and is in immediate and vigorous prosecution between the Government of the United States and certain States which have revolted against its authority; and; whereas, the Congress of the United States has, for military and other purposes, granted aid for the construction of the Central Pacific Railroad, which aid is insufficient to complete the work as speedily as is necessary; and whereas, it is important, in view of the present state of war and the further (future) danger thereof, that the said railroad be constructed as soon as possible to repel invasion, suppress insurrection, and defend the State against its enemies; therefore," etc.

Section one authorizes the corporation known as "The Central Pacific Railroad Company of California," to issue its bonds "in sums of one thousand dollars each, bearing interest at a rate not exceeding seven per cent per annum, commencing on the first day of July, 1864, and payable on the first day of January, 1865, and on the first days of July and January of each year thereafter; the interest on the first fifteen hundred of said bonds, numbering from one to fifteen hundred, inclusive, to be made payable at the State Treasury; * * * said

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bonds to be executed and issued to an amount not exceeding twelve millions of dollars, payable not exceeding twenty years from the first day of January, A. D. 1865, and said bonds to be secured by one or more mortgages on the railroad," etc.

Section two is as follows, viz:

"SEC. 2. To expedite the construction of said railroad for the reasons set forth in the preamble to this Act, there shall be levied and collected in the year 1864, and annually thereafter, until the expiration of the time for the payment of said bonds, in the same manner as other State revenue is or may be collected, a tax of eight cents on each one hundred dollars of the taxable property in the State, in addition to other taxes, the same to be paid in the gold and silver coin of the United States, and the moneys to be derived from such tax shall be and is hereby appropriated and set aside to constitute a separate fund, to be known as the 'Pacific Railroad Fund,' out of which fund the coupons for interest on said fifteen hundred bonds hereinbefore described shall be paid as they may fall due and be presented for payment from time to time for said period of twenty years, and on payment thereof said coupons shall be taken up and cancelled by the State Treasurer; and if at any time there should not be a sufficient sum of money in said fund to pay said interest when due, then an amount sufficient to make up such deficiency shall be taken from the General Fund for that purpose, or the State Treasurer shall make such other contracts and arrangements as may be necessary to make up such deficiency; and whenever on the first day of July of any year there shall remain a surplus in said fund after the payment of the interest on said bonds as hereinbefore provided, such surplus shall be paid into the General Fund."

Section four provides, that: "The said grant to said company is made upon the express condition and consideration that said company shall and do at all times when required from and after the passage of this Act, transport and convey over their said railroad all public messengers, convicts going

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to the State Prison, lunatics going to the State Insane Asylum, materials for the construction of the State Capitol building, articles intended for public exhibition at the fairs of the State Agricultural Society, and in case of war, invasion, or insurrection, as well as at all other times, also transport and convey over their said railroad all troops and munitions of war belonging to the State of California, free of charge, and without any other compensation than as herein provided, and shall also construct and equip, in running order, at a rate of not less than twenty consecutive miles of their said railroad each year hereafter, including that portion of said railroad now partially completed, until the same is fully completed and equipped." It also required the corporation to file with the Secretary of State an agreement under the seal of the corporation to perform all the conditions of the Act, and imposed other onerous conditions, among which was its consent to a repeal of a former Act providing for aid to said corporation, and a relinquishment of all rights accrued thereunder. It is further provided, that if the company fails to perform the conditions imposed on its part, "the said company shall be liable to repay to the State the amount which shall have been paid by the State under this Act."

Section five is as follows, viz: "SEC. 5. The several sums of money necessary for the payment required to be made under the provisions of this Act are hereby appropriated from the said funds and from the State Treasury for said several purposes, and the State Treasurer is hereby directed to pay the same as provided by this Act; and this Act, and the appropriations under the same, shall not be subject to the provisions of an Act entitled an Act to create a Board of Examiners, to define their powers and duties, and to impose certain duties upon the Controller and Treasurer, approved April 21, 1858."

The former Act referred to is repealed. These are the only provisions in any way creating any liability on the part of the State, or bearing upon the questions at issue in this action.

This suit was instituted in the name of the People of the

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State of California on the relation of the Attorney-General, to restrain the "Central Pacific Railroad Company" from executing, or issuing under said Act, any of the said first fifteen hundred bonds with interest payable at the Treasury of the State not already issued, and, if any have been issued, to procure a cancellation thereof, and to restrain the State Treasurer from paying, and the said company from receiving, any of the interest payable on the first day of January next, upon the first coupons falling due, or any interest that may thereafter accrue, or from in any manner proceeding further under said Act, on the ground that said Act is repugnant to the Constitution of the State, and is, therefore, void. The injunction was denied, and defendants had judgment, from which plaintiffs have taken this appeal.

The provisions of the Constitution supposed to have been violated in the passage of the Act in question, are, Article VIII, which is as follows:

"The Legislature shall not in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate, with any previous debts or liabilities, exceed the sum of three hundred thousand dollars, except in case of war, to repel invasion, or suppress insurrection, unless the same shall be authorized by some law for some single object or work, to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within twenty years from the time of the contracting thereof, and shall be irrepealable until the principal and interest thereon shall be paid and discharged; but no such law shall take effect until, at a general election, it shall have been submitted to the people, and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law, shall be applied only to the specific object therein stated, or to the payment of the debt thereby created; and such law shall be published in at least one newspaper in each Judicial District, if one be published therein throughout the State, for

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three months next preceding the election at which it is submitted to the people."

And Article XI, section ten, which is in the following words, viz:

"The credit of the State shall not, in any manner, be given or loaned to or in aid of any individual, association, or corporation; nor shall the State, directly or indirectly, become a stockholder in any association or corporation."

It is conceded in the record, that, at the time of the passage of the Act in question, the amount of indebtedness on the part of the State exceeded the limit of three hundred thousand dollars, and that the Act was not submitted to a vote of the people.

The questions to be determined, are:

Firstly—Does the appropriation made by the Act for the payment by the State semi-annually during the next twenty years of the interest on the first fifteen hundred bonds create a debt, or liability, within the meaning of these terms, as used in Article VIII of the Constitution.

Secondly—If so, does such debt or liability fall within the exception specified in said Article, of a debt created "in case of war, to repel invasion or suppress insurrection?"

Thirdly—Does it constitute the giving, or loaning of the credit of the State in aid of an individual, association or corporation, within the meaning of the prohibitory clause of Article XI, section ten?

The first question appears to us to have been determined in the negative by our predecessors in the cases of *The State of California v. McCauley*, 15 Cal. 455; *McCauley v. Brooks*, 16 Cal. 24, and *Koppikus v. State Capitol Commissioners*, 16 Cal. 249. In each of these cases, the construction of Article VIII of the Constitution upon the point now before the Court, was elaborately discussed by counsel, and determined by the Court. In the first case, the question arose upon a contract between the State and McCauley's assignor, entered into under the Act of March 21, 1856, whereby the State agreed to pay one Estell, lessee of the State Prison, the sum of ten thousand dol-

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lars per month during a period of five years, for taking care of the State prisoners, the Controller to draw his warrant monthly for said amount, which warrant was to be paid on the last day of each month, "out of money in the Treasury not otherwise appropriated." Mr. Chief Justice Field in delivering the opinion of the Court, said: "The Eighth Article was intended to prevent the State from running into debt and to keep her expenditures, except in certain cases, within her revenues. These revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the Treasury. The appropriation of the moneys when received meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. This appropriation accompanying the services operates, in fact, in the nature of a cash payment." (15 Cal. 455.) In *McCauley v. Brooks*, the question arose upon the same contract, and the Court say: "It is not essential to its validity (the validity of an appropriation), that funds to meet the same should be at the time in the Treasury. As a matter of fact, there has seldom been in the Treasury the necessary funds to meet the several appropriation Acts of each year. The appropriation is made in anticipation of the receipt of the yearly revenue." (16 Cal. 28.)

The question in *Koppikus v. State Capitol Commissioners* arose upon a contract for erecting a State Capitol, made in pursuance of the Act of March 29, 1860. The Act authorized the Commissioners to contract to the extent of one hundred thousand dollars. It provides, that, "the sum of one hundred thousand dollars is hereby appropriated out of any money in the Treasury, not otherwise appropriated, to carry this Act into effect." (Laws 1860, 131, Sec. 12.) This Act was held not to be repugnant to the Eighth Article of the Constitution, upon the same grounds as stated in *The State v. McCauley*. The Court citing that case say: "For the liabilities which may be thus incurred the Act makes provision; it appropriates, for that purpose, the requisite sum, thus anticipating their existence, and discharging them as they arise." (16 Cal. 253.)

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The principle of these cases may be further illustrated. The power of taxation is vested in the Legislature, and that power is unlimited. Says Mr. Chief Justice Field, in *McCaulley v. Brooks*: "We admit that the Legislature possesses the entire control and management of the financial affairs of the State; that it may levy such taxes as it may deem expedient, subject only to the constitutional requirements of equality and uniformity, and devote the proceeds of the taxation to such specific objects as it may think proper." (16 Cal. 34.) And, again (Ib. p. 56): "So it (the Legislature) has the power to impose a tax amounting to the entire value of the property upon which it is levied; but the possession of the power does not justify the supposition that it will be arbitrarily and tyrannically exercised."

The Legislature may not only determine the extent to which it will exercise the taxing power, but also for what objects of public interest it shall be exercised, and it may appropriate the moneys raised to such objects. The Court of Appeals of New York, in the *Town of Guilford v. Supervisors of Chenango County*, say: "The Legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the State. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude, or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires or will be promoted by it; and it is the judge of what is for the public good." (13 N. Y. 149; see also *Contra Costa County v. Board of Supervisors of Alameda County*, 26 Cal. 641; and *Blanding v. Burr*, 13 Cal. 347.)

There is in the Constitution of California no limitation on the power of the Legislature to appropriate moneys, either as to the amounts to be appropriated, or the objects for which they may be made, and only one limitation as to the time over which the appropriations may extend. Section twelve, of Article I, provides, that "no standing army shall be kept up by this State

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in time of peace; and in time of war no appropriation for a standing army shall be for a longer time than two years." This is the only limitation upon appropriations, either as to the object, amount, or time over which it may extend.

The Constitutions of some States — as New York and Ohio — have a provision like the Eighth Article in ours, and a further restrictive provision limiting all prospective appropriations to two years. Under this latter restriction, and the consequent want of power in the Legislature to raise the revenue, and make the necessary appropriations to meet the payments accruing after two years, a contract to repair the canals in Ohio for a period of five years, was held by the Supreme Court of that State to create a debt. And the debt thus created, exceeding the constitutional limit, the law authorizing the contract was declared unconstitutional. (*State v. Medbery*, 7 Ohio St. R. 526.) The effect of this additional restriction upon the question now under discussion, and the distinction between those contracts which *do*, and those which *do not, create a debt* within the meaning of the constitutional restriction, are so clearly and forcibly stated by the Court in discussing the question in *The State v. Medbery*, that we do not hesitate to quote largely from the very able opinion delivered by Mr. Justice Swan in that case.

The Board of Public Works undertook to bind the State by present obligation upon contracts for repairs of canals, etc., to pay plaintiffs and others, in instalments running through five years, the gross sum of one million three hundred and seventy-five thousand dollars. Article VIII of the Constitution of Ohio is substantially the same as the same Article in ours, except that the amount to which the debt is limited is seven hundred and fifty thousand dollars instead of three hundred thousand dollars. Article II, section twenty-two, of the Constitution of Ohio provides, that "No money shall be drawn from the Treasury except in pursuance of a specific appropriation made by law, and no appropriation shall be made for a longer period than two years." The question was whether these contracts created a debt within the meaning of the con-

stitutional prohibition. The Court say (7 Ohio St. R. 528): "Before proceeding to state the scope and operation of these provisions of the Constitution, it may be proper to allude to the general working of the financial system of the State in respect of the payment of current expenses and the creation of a debt.

"The sole power of making appropriations of the public revenue is vested in the General Assembly. It is the setting apart and appropriating by law a specific amount of the revenue for the payment of liabilities which may accrue or have accrued. No claim against the State can be paid, no matter how just or how long it may have remained over due, unless there has been a specific appropriation made by law to meet it. (Article II, Section 22.)

"By virtue of this power of appropriation, the General Assembly exercise their discretion in determining, not only what claims against or debts of the State shall be paid, but the amount of expenses which may be incurred. If they authorize expenses or debts to be incurred, without an appropriation to pay them, and the expenses are incurred, those expenses create a debt against the State, and it must remain such, until payment under an appropriation afterward made.

"The General Assembly usually, however, provide for the current expenses for a period not exceeding two years, out of the incoming revenues, by making appropriations of a sufficient amount of money to pay the expenses during that period, and provide by law for the raising of revenue sufficient to meet the appropriations.

"The discretion of each General Assembly for the period of two years in respect to the amount of expenditures, except in some special cases relating to salaries, is without limit, and without control; but each must provide revenue and set apart a sufficient amount, by law operative within the same two years, to pay all expenses and claims.

"This is the general system provided by the Constitution; (Article II, Sec. 22; Article XII, Sec. 4.) Under it, all the claims which are authorized, or which can accrue within each



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of the two years, and their payment, form one governmental and financial transaction; so that, at the end of each of the two fiscal years, the expenditures authorized and liabilities incurred have been provided for by revenues previously set apart and appropriated are paid.

"So long as this financial system is carried out in accordance with the requirements of the Constitution, unless there is a failure or deficit of revenue, or the General Assembly have failed from some cause to provide revenue sufficient to meet the claims against the State, they do not and cannot accumulate into a debt. Under this system of prompt payment of expenses and claims as they accrue, there is undoubtedly, after the accruing of the claim, and before its actual presentation and payment, a period of time intervening in which the claim exists unpaid; but to hold that for this reason a debt is created would be the misapplication of the term debt, and substituting for the fiscal period a point of time between the accruing of a claim and its payment, for the purpose of finding a debt; but appropriations having been previously made and revenue provided for payment as prescribed by the Constitution, such debts, if they may be so called, are, in fact, in respect of the fiscal year, provided for, with a view to immediate adjustment and payment. Such financial transactions are not, therefore, to be deemed debts.

"But if the General Assembly should authorize liabilities to be incurred and make no appropriations to meet them, but let each citizen who performed service or furnished materials to carry on the Government, hold his claim against the State unpaid, debts to the amount of these claims against the State would at once be created, and remain debts at the end of two years and until an appropriation was made to meet them, whatever public revenue might be on hand, inasmuch as every executive officer is forbidden by the Constitution to pay any claim unless there has been a specific appropriation for that purpose made by law.

"And for the same reason, if, without appropriations or revenue provided, the General Assembly should authorize con-

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tracts binding the State to pay specific sums of money to citizens within two years contingent upon their furnishing certain materials or labor, these contracts would at once create a contingent debt, and on performance would become an absolute debt. On the other hand, if appropriations were made, but the claims authorized to be paid could not be and were not paid, on account of there being no funds, such claims would also become debts.

"The general system in its practical workings has been described for the purpose of eliminating two or three propositions, which, however simple and obvious, cannot be lost sight of without rendering unintelligible the discussion of the questions before us. They are these:

"1. Providing revenue sufficient to meet either prospective or accruing debts authorized to be incurred, or to meet even debts over due, still leaves them unpaid, and they must remain debts contingent or absolute until a law is passed appropriating the public revenue to meet them and until they are afterward paid.

"2. *If, however, the constitutional provisions are complied with, and both revenue is provided and appropriations are made to meet expenses or claims, prospective or accruing, for the period of two years, such accruing liabilities, contingent, or absolute, are not deemed debts, public funds having been provided and set apart by appropriations for their immediate payment.*

"It will be seen at once, when these propositions are applied to the contracts before us, that this financial system and the contracts are wholly inconsistent with each other. While each General Assembly is required to provide revenue and make appropriations for the period of two years, leaving no debt or liability behind, the General Assembly existing when these contracts were made, and who it must be maintained had the constitutional power by law to authorize them, have undertaken by contracts in behalf of the State to bind the State by present obligation to pay specific amounts of money to certain citizens for services and materials, to be furnished as well during the above mentioned two years as also during

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the period of three years thereafter. It is the three years thereafter—the liability created against the State the moment these contracts were signed for the specific sums promised for the repairs of those three years—the volunteering on the part of that General Assembly to provide for the repairs of the canals *during those three years without the power of making appropriations to meet the liability thus authorized and entered into—it is these peculiar characteristics of the contracts which render them inconsistent with the system of finance and expenditure provided by the Constitution.* But we shall have occasion to recur to this subject again.

“The question before us is, whether a contract binding the State to pay specific sums of money at a future period, *without revenue provided or appropriations made to meet it*, is such a contingent liability as may be entered into under this financial system and the provisions of the Constitution relating to debt.

“I. And first as to these contracts coming within the inhibitions of the Constitution relating to debts. This question necessarily leads us to inquire as to the scope and operation of the Constitution relating to debts; what debts are inhibited; whether contingent debts are included in the inhibition; and whether these contracts create contingent debts.

“If the Constitution had contained simply the provision that ‘no debt whatever shall hereafter be created by or on behalf of the State,’ without any exception or reservation upon these sweeping terms, then, as we have already stated, no liability could have been created for money, material or services, no contract entered into, binding the State, without revenue actually raised, and appropriations therefrom made, to meet the liability during the fiscal year. And inasmuch as, by another provision of the Constitution, no appropriations can be made for a period beyond two years (Art. II, Sec. 22), it follows that if no debt whatever could be created, and no appropriation made beyond two years, then a present obligation and liability to pay at a period beyond two years could not be made, *because it could not be made on a footing of liabil-*

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ities which are provided for by appropriations, and would, therefore, be inhibited."

Again, in an answer to an argument that an absolute constitutional obligation rested upon the General Assembly to provide for the repairs of the canals, the Court further say, upon this point (page 538): "This line of argument assumes in the first place, that there is a constitutional obligation resting on the General Assembly to provide for the inherent and ordinary operations of the Government, and among others the repair of the canals; but the argument is silent both as to the period of time and the manner in which the Constitution requires each General Assembly to provide for these operations and pay for them. Instead of this obligation being an indefinite and theoretical duty as stated by counsel, it is practical and specific in manner and time, and is devolved, not on the General Assembly as a perpetual body, but upon each General Assembly, convening biennially and for the period of two years and no longer. *They must do it, too, by appropriations made and revenue provided, and consequently without creating any debt whatever.* And here their duty ends. The constitutional obligation passes over to their successors.

"If the General Assembly, existing when these contracts were made, and who are supposed to have authorized them, had undertaken by appropriations beyond two years (and that is the only mode in which they could authorize expenditures without creating debt, absolute or contingent), to provide for the repair of the canals, their law would have been unconstitutional and void. If this be not deemed an answer to the foundation of this whole line of argument, then we say further, that as to the fact that repairs beyond two years would probably be needed, and expenditure therefore required, and for an amount probably equal to that designated in these contracts, and then paid, we answer, that, whether the repairs would or would not be needed, and the amount of the expenditure and their payment were questions to be determined by the successors of the General Assembly who are supposed to have authorized these contracts to be made; and that General

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Assembly have, by their contracts, not only determined that the expenditure should be made, and fixed the amount beyond the control of their successors, but have also, in so doing, created a present liability against the State to pay specific sums of money *at such a period that they could not, by appropriations, provide for payment.* Their authority to provide, without the revenue or appropriations, for the repair of the canals beyond two years, by contracts creating a present obligation, clearly cannot be justified or constructively authorized from their duty to provide revenue and make appropriations for repairs for the period of two years only. *The first creates a contingent debt upon a subject matter beyond their sphere of duty, and relating to expenditures required by the Constitution to be provided for by their successors; the last creates no debt of any kind.*

“These contracts, then, so far as the inhibition of the Constitution relating to debts is involved, stand precisely upon the same ground as any other contracts for expenditure which the General Assembly have authorized, but provided no revenue and made no appropriations to meet the amount specified to be paid by the State when it becomes due. It is a contingent debt ripening into an absolute one, without money being set apart to meet and pay it. The contracts, indeed, can stand nowhere else than among inhibited debts, inasmuch as they are, in our opinion, and for the reasons which we shall now state, in addition to those already given, inconsistent with the provisions of the Constitution relating to expenditures and appropriations.”

And again, page five hundred and forty: “Each General Assembly determines the amount of revenue to be raised by taxation, and are required by the Constitution to provide for raising sufficient to meet the expenditures which they authorize, and thus become officially responsible for the amount of the appropriations. And in order to make this responsibility direct and practical, and to rest upon each General Assembly during its term, the Constitution *prohibits any appropriation to be made for a period beyond two years.*”

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"This last provision is the keystone of the whole system; for as the amount of taxes depends entirely upon the amount of the appropriations, if the General Assembly had no power or discretion to determine the amount of appropriations, or if the amount were fixed by a law of their predecessors, so that they could not disturb it, they would evade all responsibility for the amount of the taxes, however oppressive and grievous they might be.

"It results from these constitutional provisions:

*"First—The General Assembly at each biennial session determined the amount of the expenditure for the two years of their official term, in all cases not otherwise predetermined by the provisions of the Constitution. Second—They must take the responsibility of making the necessary appropriations for this purpose, otherwise no money can be paid. Third—They must assess a tax upon their constituency sufficient in amount to meet the appropriations. * * * But all these restraints upon the members of the General Assembly and their official responsibility for the amount of appropriations and taxes to be assessed, so wisely provided by the Constitution, are set aside and annulled by the contracts under consideration. Instead of being entered into for two years, and appropriations made and revenue provided therefor, the contracts are made for five years; and, after the expiration of two of the five years, the contracts determine, and not the succeeding General Assembly, what amount of appropriations shall be made, and consequently what amount of revenue shall be provided for the repair of the canals. (Ib. 541.) * * * We are of the opinion that the discretion, power and responsibility of the General Assembly conferred by the Constitution were not intended to be, and therefore cannot be thus superseded; that no law could be passed under which an agreement between the Board of Public Works and two or more citizens could for any period beyond two years divest the General Assembly of its discretion and control over the appropriations, or the amount of the appropriations to be made for repairs to the public works of the State." (Ib. 542.)*

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The principles thus stated and illustrated are these: That the legislative department of the Government is vested with the power of taxation, and the authority to determine the objects for which the taxing power shall be exercised, and to appropriate the moneys thus raised to such objects; but that the power of appropriation under the Constitution of Ohio is limited to two years—that, when an appropriation is made for an object to be accomplished, and paid for within the two years, and at the same time, revenue is provided to meet the appropriation, a contract made in pursuance of the appropriation, and payable out of it, does not create a debt within the meaning of the prohibitory clause of the Constitution. The whole is regarded as a single financial transaction. The revenue is provided and set apart for the specific object, and is in contemplation of law in the Treasury. In fact, only the ministerial duty remains of collecting the revenue, and paying it over in pursuance of the appropriation, and the acts done are regarded as cash transactions. But a contract to be performed beyond the two years, or without raising and appropriating the revenue to meet it, necessarily creates a debt, as the services cannot be paid for when rendered in the first case, because the legislative power has no authority to make the appropriation, and in the second, because it has failed to do it. The theory is, that if the Legislature provides a million of dollars revenue, by taxation or otherwise, for any given year, or other period of time within the constitutional limit, and appropriates a million of dollars to be paid out of it, the one balances the other, and the debt or liability of the State is not increased thereby. True, a portion of the money provided may be stolen, or destroyed, or by reason of some unlooked for accident may not be collected or on hand when needed, and in such case a debt or liability might ultimately accrue from this cause to the extent of the deficit thus accidentally arising. But no debt can result till the contingency arises, and the validity of the debt can only be affected to the extent of such accidental deficit.

In our Constitution, as we have seen, there is no restriction

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upon the power of taxation, or upon the objects, or the time for which appropriations may be made, except, that "no appropriation for a standing army shall be for a longer time than two years." As to all other objects, so far as any constitutional restriction is concerned, it may as well be for twenty as for two years. This may have been an unwise omission, and yet it does not seem to have been an oversight, for the attention of the framers of that instrument was directed to the subject, when the two years limitation was imposed upon "appropriations for a standing army."

The Act under consideration provides, that "there shall be levied and collected in the year 1864, and annually thereafter until the expiration of the time for the payment of said bonds, in the same manner as other State revenue is or may be collected, a tax of eight cents on each one hundred dollars of the taxable property in the State, in addition to other taxes, the same to be collected in the gold and silver coin of the United States, and the moneys to be derived from such tax shall be and is hereby appropriated and set aside to constitute a separate fund, to be known as the 'Pacific Railroad Fund,' out of which the coupons of interest on said fifteen hundred bonds hereinafter described shall be paid as they may fall due and be presented from time to time for said period of twenty years." (Section 2.) And in section five: "The several sums of money necessary for the payment required to be made under the provisions of this Act are hereby appropriated from the said funds and from the State Treasury for said several purposes, and the State Treasurer is hereby directed to pay the same as provided by this Act." Here is a provision for raising a fund, and setting apart and appropriating it to the payment of the interest on the bonds in question, more specific than those in the cases of *The State v. McCauley*, *McCauley v. Brooks*, and *Koppikus v. State Capitol Commissioners*, because in those cases the payment was to be made, generally, out of "moneys in the Treasury not otherwise appropriated," without providing any specific fund and devoting it to that use alone, or knowing whether or not there would in fact be any unappropriated moneys in

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the Treasury at the time payments would fall due. In this case a specific fund is provided and set apart, to be devoted to the payment of the interest in question alone; and it would seem to be more than ample for the purpose, as the tax provided for on a sum much less than the present assessed valuation of the taxable property in the State, would produce the required amount, and the appropriation from the General Fund will not be required till the specific fund is exhausted, which may, and in all probability, never will occur. For these reasons there would be even less propriety in holding this appropriation to be a debt or liability, within the meaning of the constitutional restriction, than those which were the subjects of discussion in the cases cited. The Legislature has provided a fund, and made the appropriation for the entire amount. No further legislation is required upon the subject. Nothing further remains to be done on the part of the State, but the ministerial duty of collecting the taxes and paying the interest out of the proceeds, as it from year to year accrues. Of course the State cannot, without a breach of good faith, refuse through its officers to perform this ministerial duty.

The same reasons that are urged to show that the Act under consideration creates a debt or liability within the meaning of these terms as used in the Constitution, apply with equal force to all of the appropriations made in this State for defraying the general expenses of the State Government; and upon the construction contended for, it would be impossible to carry on the Government without violating the Constitution, or levying and collecting the revenues of the State, under the present Constitution, two years in advance of the time when they would be required for actual disbursement. It is utterly improbable that such should have been the intent of the men who framed, or the people who adopted the Constitution.

But if the reasons for maintaining the decisions already cited upon this question were less cogent than they are, we should now hesitate long before overruling them. The last of them was rendered in 1860. The construction put upon the clause under consideration thenceforth became a judicially recognized

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part of the Constitution. Since that time two Legislatures have proposed, and the people have adopted, numerous amendments to other sections of the Constitution, but this provision was left unchanged. It must be presumed, therefore, that they were satisfied to have the provision under consideration stand with the interpretation thus put upon it by the Courts.

It follows, from these views, that the Act under consideration does not create, or authorize to be created, a debt, or liability, within the meaning of the limiting clause of the Eighth Article of the Constitution.

Secondly—Conceding a debt or liability to have resulted from the action of the Legislature, is it a debt created “in case of war, to repel invasion, or suppress insurrection?”

Whether or not the contingency has arisen, which authorizes the Legislature to exercise the power vested in it, within the meaning of this exception, and whether it will exercise the power, are questions for that body to determine. The duty and responsibility of providing ways and means to carry on a war in which the State may be engaged, or for repelling, or aiding to repel invasion, or suppressing or aiding to suppress insurrection, rest upon the political departments of the Government, and not upon this Court; and the correlative right to determine when the emergency has arisen requiring their action, must, necessarily, to be effective, reside in those bodies upon which this great public duty, and weighty responsibility are imposed. If this power is exercised improvidently or unwisely, the individual members of those departments are responsible therefor to their constituents. But when the political departments of the Government have determined that the emergency has arisen, and acted upon that determination, that action is conclusive, and not subject to be reviewed by this Court.

That the State of California, as an integral part of the United States, is actually engaged in war, and in suppressing a vast and powerful insurrection, the general history of the country, and the legislation, both of the State and National Governments, as well as their judicial records, furnish ample evidence.

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Nor can it be assumed, that, in the war actually existing, there is no active element of insurrection, and no immediate danger of conflict within our own borders and upon our own soil. The National Government has, at least, thought it necessary to make extraordinary preparations for our defense. It has during the last four years expended and is now expending, large sums of money in the erection of fortifications for the protection of our harbors, and in building an iron-clad vessel for our immediate use. Our principal city also, lest the completion of the ironclad Monitor furnished by the General Government should be too tardy, has assumed large responsibilities in order to hasten the work. So also successive Legislatures have, in various ways, appropriated and expended hundreds of thousands of dollars for organizing and drilling our militia, and holding camps of instruction to prepare our citizens for prompt and effective service, should the insurrection more decidedly manifest itself within our own borders.

It cannot be disguised, that, in spite of a determination on the part of the General Government to deal justly with all nations, and of the exercise of the most consummate skill of diplomacy to avert such a result, the existing rebellion is liable at any moment to draw after it a foreign war, and an invasion of our State from abroad. War has, in fact, been actually levied within our borders, as in the case of the Chapman, and active hostility may at any moment manifest itself anew. These facts constitute a portion of the general domestic history of the country, as well as of its legislative and judicial history, and as such may be noticed. (Prize cases, 2 Black, U. S. Sup. Court R. 667.) They furnish, at least, a basis for the political departments of the Government to consider, whether or not the contingency contemplated by the exception in the Constitution has arisen; and if those departments have considered and determined the question, that determination is conclusive. This point was also decided by our predecessors—all the Justices concurring—in the case of *Franklin v. The Board of Examiners*, 23 Cal. 175, in which the same question arose under the Act of April 27, 1863, (Laws of 1863, p. 662,)

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appropriating six hundred thousand dollars "for the relief of the enlisted men of the California Volunteers in the service of the United States." The Court say: "The evident intention was to impose limitations upon the general power of the Legislature to create debts, leaving them free, however, from such restrictions in great emergencies caused by a war, an invasion or an insurrection. In such cases the Legislature should be left free to exercise their judgment and discretion upon the subject, answerable alone to the people for any abuse of the power. The existence of the emergency calling for the exercise of the power is purely a political question, and the Legislature, as the body in whom the political power of the State is vested, are the sole judges as to the existence of such emergency. It is the exercise of a purely political power, upon a political subject, in no manner of a judicial character, and it is not, therefore, subject to review or liable to be controlled by the judicial department of the State Government." To the same effect are the cases of *Martin v. Mott*, 12 Wheat. 29; *Luther v. Borden*, 7 How. U. S. S. C. 44; *Vanderheyden v. Young*, 11 John. 157.

Railroads are, undoubtedly, among the most effective agencies employed in modern warfare. In the existing war hundreds of miles of railroads have been destroyed, at a great expenditure of life and treasure, expressly to deprive the adversary of the destroying army of their use; and many other miles have been constructed, at Government expense, expressly to facilitate the operations of its armies. A railroad from the navigable waters of the State to the granite quarries and forests of the Sierra Nevada mountains, might be of great importance to furnish timber and granite for fortifications, and timber for vessels of war, in case our only port of San Francisco should be blockaded, and cut off from all attainable external sources of supply; and it might be of great service for other uses to which such works are applied in military operations. Such a road the "Central Pacific Railroad" is designed to be. The National Government thought its construction a matter of sufficient importance in a military point of view to

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justify large grants of land, and grants of the use of the national credit to a large amount to aid in its construction. Whether or not, in view of such facts, this railroad is of sufficient importance to the military operations of the State of California in the emergency present and prospective, and as such a proper subject for legislative appropriations with a view to hastening its completion, and rendering it available to the State at an early day, are also questions committed to the sound discretion of the political departments of the State Government. These departments being charged with the duty of providing for the safety of the State, are authorized to select such means of defense and protection as they may deem most appropriate. Mr. Chief Justice Marshall, in *McCullough v. State of Maryland*, 4 Wheat. 421, says: "We think the sound construction of the Constitution must allow the National Legislature that discretion with respect to the means by which the powers it confers are carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional." (See also *Lick v. Faulkner*, 25 Cal. 405.) Such being the case, the determination of these questions by the political departments of the Government must, also, necessarily be conclusive.

The only remaining inquiry under this head, is, whether those departments have determined that the exigency has arisen requiring their action, and, that the work is of sufficient importance to the State for military purposes to justify an appropriation of the public moneys to aid and hasten its early completion? And to this inquiry, the Act itself under consideration furnishes a conclusive answer in the affirmative.

The preamble recites the existence and vigorous prosecution of the war between the Government of the United States, and certain States which have revolted against its authority; the grant by Congress of aid for the construction of the Central Pacific Railroad for military and other purposes; the insuf-

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iciency of such aid to complete the work as speedily as necessary; and the importance "in view of the present state of war and the further [future] danger thereof, that the said railroad be constructed as soon as possible to repel invasion, suppress insurrection and defend the State against its enemies," and then enacts in section two, that "to expedite the construction of said railroad, *for the reasons set forth in the preamble to this Act*, there shall be levied and collected," etc. Thus the contingency contemplated in the Constitution is recited in the preamble, which is referred to in the body of the Act for the reasons that operated upon the Legislature to induce that body to pass the law and make the appropriation.

Thirdly—Does the Act in question give or loan the credit of the State to an individual, association or corporation, within the meaning of the prohibition contained in Sec. 10, Art. XI, of the Constitution?

"In case of war, to repel invasion or suppress insurrection," as we have seen, the Legislature may appropriate the funds, or employ the credit of the State without limit. The two provisions must be so construed, if possible, that they may stand together, and so that there shall be no restriction upon the general power of the political departments of the Government to render all the resources of the State available in time of war. If the Legislature may authorize the building of a railroad for military purposes, it may certainly appropriate funds to aid a corporation in the construction of a similar work in consideration of its use for such purposes. The principal end being the advantage to be derived from the use of the road, it matters not that the appropriation incidentally aids an individual, association or corporation. And as before shown, the question, as to whether the emergency requiring an appropriation for such purposes has arisen, is one for the political departments of the Government to determine.

But in our view there is no loan or gift of the credit of the State in any just sense of these terms. A railroad extending from the navigable waters of the State to its eastern boundary on the summit of the Sierra Nevada, and designed ultimately

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to unite with another road connecting it with the Atlantic seaboard, was, at the time of the passage of the Act in question, in process of construction, and actually completed and in operation for a very considerable portion of the distance. In the judgment of the Legislature, the State had, or was liable to have, immediate use for this railroad for military purposes, and upon certain onerous considerations, among which, were, that the company constructing said railroad should proceed and complete it at a certain rate per annum, and should, at "all times when required from and after the passage of this Act, transport and convey over the said railroad, all public messengers, convicts going to the State Prison, lunatics going to the Insane Asylum, material for the construction of the State Capitol, articles intended for public exhibition at the fairs of the State Agricultural Society, and in case of war, invasion or insurrection, as well as at all other times, also transport over their said railroad all troops and munitions of war belonging to the State of California free of charge, and without any other compensation," than as in said Act provided, made the appropriation under consideration. It is, then, simply a case of the State paying a corporation for valuable services to be rendered, commencing at the present moment and extending through all future time. It is not a matter of the slightest consequence to the State whether the payment is made directly to the company or to the creditors of the company, except by securing it to the creditors of the company, who furnish in part, the funds to carry on the work, the money for that purpose is more likely to be readily obtained; and in this respect, an advantage accrues to the State in obtaining a greater security for the performance of the contract on the part of the company. The State purchases certain advantages of the company, and pays the price to certain designated creditors of the company in satisfaction of interest accruing from time to time on its bonds, instead of paying it directly to the company.

Besides, as we held in the discussion of the first point, no debt on the part of the State is created, and consequently no

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credit in any proper sense of the term arises. The act of the State in assuming to make these payments, consists in a single provision made in advance, raising a fund, setting it aside and specifically appropriating it to the payment of the interest semi-annually, from year to year, upon the presentation of the coupons at the State Treasury — these coupons serving as warrants upon which the money is to be drawn from the Treasury. As no debt or liability in the constitutional sense is created, so no credit in the constitutional sense arises, or is loaned or given. A fund is provided in advance for the purpose, and out of it the services to be rendered by the company to the State are to be paid, but the payments are to be made on behalf of the company, in satisfaction of interest due from it to certain designated creditors. The money being provided in the first instance, and being in contemplation of law, always on hand in the Treasury, before the instalments of interest accrue, the transaction on the part of the State upon the principles before stated, is regarded as a cash transaction. From these views, it follows, that, the Act in question is not repugnant to section ten of Article XI of the Constitution.

Our conclusion is that the Act in question is constitutional.

The judgment, so far as it denies the relief asked for in the complaint, must, therefore, be affirmed.

But the judgment goes beyond this and affords affirmative relief in favor of the "Central Pacific Railroad Company," one of the defendants, against Pacheco, another defendant, and his successors in office. There is nothing in the record to sustain this part of the judgment, and to this extent it is erroneous and ought to be corrected. True, Pacheco has not appealed, but the People, and not Pacheco, are the real parties in interest. That part of the judgment may be of no practical consequence, but it is, nevertheless, not sustained by the record, and for this reason ought not to stand.

It is ordered that the District Court modify its judgment by striking out all that portion of the said judgment subsequent to the denial of the injunction, and of the relief sought in the

Opinion of Rhodes, J., concurring specially.

complaint, and that the judgment as thus modified stand as the judgment of the Court.

Mr. Justice RHODES, concurring specially.

I concur in the judgment on the sole ground that, by virtue of the Act of the Legislature mentioned in the opinion of Mr. Justice Sawyer, and the issuing of the first fifteen hundred bonds with coupons attached, by the railroad company, payable by the State, a *debt* against the State was created, which was none the less a debt, and did not cease to be a debt, because provision was made in the Act for its payment—that is, because a tax was levied and an appropriation was made for that purpose; and that the existence of war removed the constitutional restriction against the creation of a debt exceeding three hundred thousand dollars.

JEFFERSON WILCOXSON AND JACKSON WILCOXSON v. CHAS. H. BURTON, JOHN E. P. SPILLMAN, JOHN B. BURTON, EDWARD McCARTY, AND S. MARSHALL, LATE SHERIFF OF SACRAMENTO COUNTY.

NEW TRIAL.—If the evidence is conflicting, a new trial will not be granted on the ground that the findings of the Court are not warranted by the evidence.

FRAUDULENT CONFESSION OF JUDGMENT.—A voluntary confession of a judgment made upon a *bona fide* debt by the debtor in favor of the creditor, without the knowledge of the creditor, and the issuance of an execution thereon at the request of the debtor, and a levy on the debtor's goods by virtue thereof—also without the knowledge of the creditor—for the purpose of enabling the creditor to obtain priority over other creditors of the debtor, is such a fraud upon the other creditors as renders the judgment and levy void, as to an attachment or execution in favor of the other creditors afterwards levied on the same property.

VOLUNTARY JUDGMENTS — WHEN VOID.—A judgment rendered upon confession of the debtor, and at his instance, without any request on the part of the creditor, and without his knowledge, is void as between the parties, and will not bar an action brought by the creditor on the same cause of action, nor will it estop the debtor from denying all the facts set forth in it.

RATIFICATION OF JUDGMENT.—When a debtor confesses judgment without the knowledge or request of the creditor, and the creditor thereafter ratifies it, and attempts to enforce it, it will become binding between the parties to it

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by force of the ratification, but such ratification cannot affect rights acquired by other parties prior to the ratification.

CONFESSION OF A JUDGMENT FOR A SUM GREATER THAN IS DUE.—The execution and delivery of a note by the debtor to his creditor for a sum greater than is actually due, for the purpose of defrauding other creditors of the debtor, and the voluntary confession of a judgment on the same by the debtor, renders the judgment fraudulent and void as to the other creditors of the debtor.

WHAT CLAIM IS MERGED BY JUDGMENT.—A judgment by confession merges no claim of the creditor except such as are included in it by some form of direct statement.

ESTOPPEL.—A defendant is estopped from proving the averments of his answer to be false.

STATEMENT CONFESSING JUDGMENT.—If the statement upon which a voluntary confession of judgment is made does not correctly describe the debt, the judgment is void as to the creditors of the judgment debtor.

EVIDENCE OF INDEBTEDNESS INCLUDED IN A VOLUNTARY JUDGMENT.—If a suit is brought to set aside a judgment confessed voluntarily, on the ground that the same is fraudulent, the parties defendant cannot introduce parol evidence to sustain the judgment, which will show that the statement on which it was rendered was false, nor can they introduce parol evidence of items of indebtedness not only not included in the statement, but by implication excluded from it.

NEW TRIAL FOR IRREGULARITY.—If the Court, after a case is submitted, examines books of account as evidence, which have not been given in evidence during the trial, a new trial will not be granted for this irregularity unless it is stated in the record to be one of the grounds on which the motion will be made.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

The executions issued on the judgments confessed by Burton & McCarty in favor of C. H. Burton, and Spillman, were levied by Marshall, the Sheriff, on the goods of Burton & McCarty. The plaintiffs commenced suit against Burton & McCarty on their indebtedness, and procured attachments, which were afterwards levied on the same goods.

The other facts are stated in the opinion of the Court.

J. W. Winans, for Appellants.

H. H. Hartley, for Respondents.

By the Court, *SHAFTER, J.*

On the second day of October, 1861, a judgment for twenty-four thousand dollars was entered in the District Court of the Sixth Judicial District in favor of C. H. Burton against Bur-

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ton & McCarty, defendants herein, upon the following statement, duly entitled and sworn to by them:

"We hereby confess judgment in favor of Charles H. Burton, plaintiff above named, for the sum of twenty-four thousand (\$24,000) dollars, and authorize the entry of judgment against us therefor, with costs.

"This confession of judgment is for a debt now justly due from us to plaintiff, arising upon the following facts: Since the year 1852 up to the present time, plaintiff, Charles H. Burton, has been a resident of San Francisco, and has during such time acted as our agent, *i. e.*, agent of firm of Burton & McCarty, of the City of Sacramento, of which we, John Burton and E. McCarty, are the members. That as such agent the plaintiff has from time to time during the period aforesaid made advances of money upon our account, and rendered services unto us; that upon the 31st of May, 1861, plaintiff and ourselves accounted together and made a balance sheet of our transactions to that day; that thereupon we were found indebted unto plaintiff in the sum of twenty-seven thousand dollars; that thereupon we gave our obligation unto plaintiff to pay unto him said sum, with interest at the rate of one and one half per cent per month; that upon said note there has been paid the sum of thirty-five hundred dollars.

"J. E. BURTON,

"EDWARD MCCARTY."

The said Burton & McCarty on the same day made a further confession in favor of defendant Spillman, for ten thousand dollars, in which the facts out of which the indebtedness arose, are set forth as follows:

"This confession of judgment is for a debt now justly due from us to plaintiff, arising out of the following facts: The plaintiff has between the years 1852 to 1857, and from thence until the present time, with exception of some four months during the year 1857, been in our (Burton & McCarty's) employ as salesman, at our place of business. During such period

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we have become from time to time indebted unto him for his services, and during such time he has been in the habit of investing with us such moneys as he accumulated, to be used by us in our business. Upon investigating his account with us we find the sum of ten thousand dollars to be justly due him from us."

This action is brought for the purpose of setting aside these judgments, on the ground that they are, respectively, fraudulent and void as to the plaintiffs, creditors of Burton & McCarty.

As to the judgment in favor of C. H. Burton, the complaint charges that at the date of the confession the indebtedness of Burton & McCarty to C. H. Burton did not exceed two thousand dollars at the most; that the confession was made without his knowledge, consent or solicitation, and that no person was duly authorized to accept or receive the same in his name or for his benefit; that the same was made by Burton & McCarty on their own motion, and was filed by them or by their procurement; that they took out execution and caused the same to be levied on their property, and that the said C. H. Burton, who resided in San Francisco, knew nothing of these proceedings until the day after the levy, when he, being well aware of their fraudulent character, justified them, and has ever since continued to justify and claim under them, as *bona fide*.

As to the judgment of Spillman, the complaint alleges that Burton & McCarty owed him but a few hundred dollars, instead of ten thousand. That Spillman has taken out execution on said judgment, and caused it to be levied, and that Burton & McCarty are insolvent.

All the principal allegations were denied. The trial was by the Court, who found for the plaintiffs, and judgment was thereupon duly entered upon the findings.

The defendants moved for a new trial, on the ground of insufficiency of the evidence to justify the decision, and that it is against law; and upon the further ground, so far as Spill-

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man is concerned, of newly discovered evidence. The notice also refers to errors of law occurring at the trial, and excepted to by the party, as ground upon which the motion would be rested; but there is no specification in the record, nor does the brief filed for the appellant refer to any errors falling within the general description.

The motion for new trial was overruled, and the appeal is from the order.

The Court finds, generally, that both judgments are fraudulent, as alleged, and then proceeds to find specifically a series of facts, some of which are ultimate in their character, and others secondary merely, raising presumptions more or less cogent as to the truth of the allegations of fraud. Passing the general finding that both judgments were fraudulent as to the creditors of Burton & McCarty, the counsel of the appellants advanced two propositions: First—That all the facts, both final and secondary, bearing upon the question of fraud, were found by the Court upon insufficient testimony; and Second—That the ultimate facts found by the Court are, as matter of law, insufficient to support the judgment.

First—We have examined the testimony contained in the voluminous record filed in this action with patient attention; and have furthermore aided ourselves of the thorough and exhaustive discussion of counsel upon the weight of the evidence and the conclusions properly to be drawn from it, and we are satisfied not only that the case is one where the evidence is in conflict, but one in which the Court below did not so far mistake the relative weight of the opposing proofs as to justify us in going behind the special findings. The position of the counsel for the appellants that many of the special findings are without evidence to support them, is not borne out by the record. Where the findings are not sustained by direct evidence in opposition to the positive testimony of the parties to the respective judgments, they are sustained by the admissions or counter-statements in the answers, or by the evidence of circumstances; and under the

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settled practice of this Court we cannot review the case upon the testimony.

Second — The only question remaining to be considered, aside from that made upon the evidence alleged to be newly discovered, and a question of "irregularity," is as to whether all or any of the *find* facts, specially found, support the judgments as matter of law.

1. As to the judgment in favor of C. H. Burton.

It is found that Burton & McCarty were insolvent at the date of the judgment; that C. H. Burton resided in San Francisco, and was there the day the judgment was confessed; that "the confession was given and caused to be entered up by Burton & McCarty of their own motion;" that "no one was authorized by said C. H. Burton to receive said confession of judgment for him or to act as his agent in that respect;" that "he did not know said confession had been made until the day following its entry and after the levy of execution issued thereon, after the levy of plaintiff's attachment; and that the giving of said confession was a voluntary act on the part of said Burton & McCarty to enable said Charles H. Burton to obtain priority over all the creditors of said Burton & McCarty, including the plaintiffs; and that said Burton & McCarty directed and caused the execution on said confession to be levied on their property immediately after its issuance;" and that "the goods so levied upon were all the visible property of said Burton & McCarty." In addition to these findings, the complaint alleges that at the date of the confession Burton & McCarty were "apprehensive that the claims of these plaintiffs and others, their *bona fide* creditors, would be presented to them for payment, and if not paid, that attachments would be issued against them and their property;" and that "the confession was made for the purpose of giving a prior lien to C. H. Burton." The truth of these averments is not denied in the answers, and is assumed throughout in the argument of counsel. The question is: What is the legal effect of these facts upon the rights of the parties?

It was held in *Ryan v. Daley*, 6 Cal. 238, on a state of facts

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like the above in every substantial particular, that the judgment was void as to the subsequent attaching creditor. There can be no doubt as to the right of a debtor in insolvent circumstances to pay or secure a part of his creditors to the prejudice of the balance, nor is it doubted that security may be given, effectually, by confessions of judgment in favor of the creditors intended to be preferred. The real question is, when does a judgment based upon a confession made without any request on the part of the creditor and without his knowledge, and entered up at the instance of the debtor alone, become a judgment as between the parties to it? that is, when does it take effect in fact "as a final determination of the rights of the parties in the proceeding?" (Practice Act, Section 144.) It is clear that a judgment, in the case supposed, would have no effect at the date of its entry. So far as the creditor is concerned, he would not be bound to accept the judgment as the measure of his rights. It would not bar an action brought by him on the same *gravamen*, nor would it even estop the party by whom the confession was made from denying any or all the facts set forth in it. A judgment without parties, or a judgment, however perfect in form, which is attended with none of the consequences of a judgment, can be a judgment only by pretension. It may be admitted, where a debtor confesses judgment without the request or knowledge of his creditor, and the creditor thereafter ratifies it by claiming under it and attempting to enforce it, that the record will become binding as between the parties to it — by force of the ratification; and that by relation the judgment, as to them, would be considered as good from the date of its entry. But such ratification can neither override nor in any manner affect rights acquired prior to the ratification and while the judgment was one only in name. To hold otherwise would be to go counter to all analogy, and would be subversive of authority which it is now too late to question. The case of *Bailey v. Bryant*, 24 Pick. 198, cited for the appellants, is not opposed to the views which we have presented; for the decision in that case was put upon the ground — first, that the first attachment suit was brought

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in effect by the direction of the creditor; or, that failing, then upon the ground that both the suit and the attachment were ratified by the creditor before the second attachment was made.

2. The Court further found that the actual indebtedness of Burton & McCarty to C. H. Burton at the time when the note mentioned in the confession was executed, was nine thousand eight hundred and three dollars and seventy-three cents less than the amount for which the note was given, and that said excess was included in the note for the purpose of defrauding creditors. These facts being given, the judgment is unquestionably void. (*McKentry v. Gladwin et al.*, 10 Cal. 227; *Scales v. Scott*, 13 Cal. 76.) There is little or no positive evidence to support the finding upon which the conclusion proceeds, but the circumstantial evidence in favor of its correctness is entitled to the gravest consideration.

3. But further: The note is misdescribed in the judgment and in the statement on which the judgment is founded. The note was for twenty-seven thousand five hundred and forty-five dollars and eighty-one cents, at two per cent per month interest; and it is described as a note for twenty-seven thousand dollars at one and one half per cent interest, and the facts out of which the indebtedness arose are not set forth in the statement with proper precision. By reason of these defects, and on the authority of *Richards v. McMillan*, 6 Cal. 419; *Cordier v. Schloss et al.*, 12 Cal. 143, and *Cordier v. Schloss et al.*, 18 Cal. 576, the Court held that the judgment was *prima facie* fraudulent, and that the burden of rebutting the presumption was upon the party claiming under the judgment. Now, the confession states that the indebtedness for which the note was given was for "services and advances," and it behooved the creditor to prove that at the date of the note Burton & McCarty were indebted to him for "services and advances" in the sum of twenty-seven thousand five hundred and forty-five dollars and eighty-one cents. But the defendant (C. H. Burton) was estopped by his answer from proving the proposition — for he had averred therein that the amount

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for which the note was given was not due him for "services and advances," but for services and advances, and interest thereon (nine thousand four hundred and nineteen dollars and four cents,) at the rate of two per cent per month, under a special agreement to that effect. The defendant, however, was allowed to go into proof of the interest item, and the Court has found that as two thousand one hundred and two dollars and forty-four cents, parcel thereof, the interest was cast upon the amount due for service, and in the absence of any contract, either written or verbal; and, it may be added that the defendant, in his answer, in stating the contract for interest, limits the interest to "advances." Our purpose, however, is not to make any use here of the finding of the Court on the question of interest. For the purposes of the argument, at this point it may be assumed that the finding was a false finding, and that the nine thousand four hundred and nineteen dollars and four cents was lawfully due, as interest on the principal claims, at the time the note was executed; and that Burton & McCarty had reference to that item in settling, in their own minds, the amount of the judgment to be confessed. Still, these facts cannot be considered in the defendants' favor, for the reason that they contradict the terms of the confession and demonstrate a fraud, consisting at once in a suppression of the truth, and in a suggestion of what was manifestly false. In stating that Burton & McCarty were indebted to C. H. Burton in the sum of twenty-seven thousand dollars for "services and advances," a "suggestion" was made which all the answers show to have been false, for they all aver that when the note was given there was only eighteen thousand one hundred and twenty-six dollars and seventy-seven cents due on the grounds named in the statement; and though twenty-seven thousand five hundred and forty-five dollars and eighty-one cents may have been due at the giving of the note, still, by the answers, there was a suppression of the truth also; for the confession, by the hypothesis, disclosed less than two thirds of the true basis of the indebtedness; thereby putting C. H. Burton in a position to bring an action for the non-perform-

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ance of the interest contract alleged, unembarrassed by the judgment. A judgment by confession merges no claim of the creditor, except such as are included in it by some form of direct statement; and interest is neither a "service" nor "advance." The cases of *Richards v. McMillan*, and of *Cordier v. Schloss* have no bearing upon the point which we are now considering. In each of those cases the statement was defective, because it was too general; and the judgments were held to be fraudulent *prima facie* for that reason; and it was further considered that the party might supply the omitted details by testimony to be produced at the trial. The point adjudged is, that particular facts lying within the scope of the general terms used in a confession, may be brought forward by averment. If the confession states a "promissory note," (implying a consideration), or "services" or "advances," or both, as the source or ground of indebtedness, the creditor, always keeping within the limits of the terms used, may prove all matters explanatory. Beyond this he cannot go. To allow him to go further, and prove a claim which the statement not only does not include, but excludes by necessary intentment, would be to allow him to prove his judgment to be "virtuous" (6 Cal. 421) by proving it to be false; and to this solecism, we may add, that such license of proof would violate every rule of evidence applicable to the question, and invite a perpetration of the very frauds against which the statute was intended to guard.

Second — As to the judgment confessed in favor of Spillman.

For reasons kindred to those already stated, we cannot set aside the findings of the Court in their bearings upon this judgment, on the ground that they are not supported by the evidence. It is true there was no lack of positive testimony in favor of its integrity, but the Court below evidently more than doubted its truth in view of the logic of the events proved. As to the legal effects of the facts found there can be no question.

It is urged that the Court examined the account of Spillman in the books of Burton & McCarty after the case was

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submitted, the books not having been given in evidence. Were this imputation true as fact, no advantage could be taken of it on this appeal, however Spillman may have been prejudiced by it, and for the reason that the "irregularity" (Practice Act, Sec. 193) is not stated in the record as one of the grounds upon which the motion for a new trial would be made. But it is established, both by the statement and by a special certificate of the Judge, that the books were in evidence in fact; and as to the newly discovered evidence the affidavits disclose nothing new except the mistake of defendants' counsel in supposing the books were not put in evidence at the trial.

Mr. Justice SAWYER expressed no opinion.

JAMES B. McMINN v. MOSES O'CONNOR, RICHARD F. RYAN, AND JANE HOGAN.

ACKNOWLEDGMENT OF A DEED.—A consular agent of the United States in a foreign port, on the 15th of January, 1859, or prior thereto, was not empowered to take and certify the acknowledgment of the execution of a deed conveying real estate in this State.

CERTIFICATE OF ACKNOWLEDGMENT OF DEED.—A certificate of the acknowledgment of the execution of a deed is defective if it does not state that the person making the acknowledgment is known to the officer, or proved to him to be the person described in and who executed the same.

CERTIFIED COPIES OF DEEDS AS EVIDENCE.—Copies of deeds duly filed for record in the Recorder's office of the proper county, or which, after having been duly filed for record, have been recorded in the proper book of records, are admissible in evidence in all Courts and in all actions and proceedings with the like effect as the originals could be if produced, upon proof of the loss of the originals, or that they are not in the power of the party offering the copies.

DEEDS DULY RECORDED.—Deeds not properly acknowledged or proved, but filed for record or recorded in the proper book of the proper county, are not duly filed for record or duly recorded.

CERTIFIED COPY OF RECORDED DEED NOT DULY ACKNOWLEDGED AS EVIDENCE.—A certified copy of a deed filed for record, or recorded in the proper book of records prior to the Act of April 30, 1860, but which was not acknowledged, or proved as required by law, is not admissible in evidence without proof being first made that the original deed was genuine, and was, in truth, executed by the grantor or grantors therein named.

DEED NOT DULY ACKNOWLEDGED, EXECUTED AND WITNESSED IN A FOREIGN COUNTRY.—Where a deed not properly acknowledged is executed and wit-

Argument for Appellants.

nessed by a subscribing witness in a foreign country, proof that it was executed by the grantor is sufficient to entitle it to be received in evidence without producing the attesting witness, or accounting for his absence, or proving his handwriting.

EVIDENCE OF TITLE ACQUIRED PENDING LITIGATION.—If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending the litigation, evidence of this fact cannot be introduced, unless it is pleaded as a defense in a supplemental answer.

CERTIFICATE OF PURCHASE AS EVIDENCE.—A certificate of purchase of real estate, executed by a Sheriff on a sale made by virtue of an execution issued on a judgment, is incompetent as evidence to establish any right, either legal or equitable, to the possession of the premises therein described.

DISCRETION OF COURT IN ALLOWING AMENDMENTS.—If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending litigation, and has not pleaded such title in a supplemental answer, and for that reason his evidence of such title is excluded by the Court, it is not an abuse of the discretion of the Court to deny his application made during the trial, to be allowed to amend his answer so as to obviate the objection.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

John W. Dwinelle, J. McM. Shafter, and Edmond L. Goold, for Appellants, confined their argument to the question whether the Court erred in excluding the judgment roll and proceedings in the District Court of the Twelfth Judicial District, in the case of *Gleason v. Maume and others*.

Edward Tompkins, also for Appellants.

I. The certified copy of deed from Maume to Dundon, under which plaintiff made title, was improperly admitted in evidence, because—

1. The original was not shown not to be in possession of plaintiff, nor was it in any manner accounted for.

2. The original, if it had been produced, could not have been admitted in evidence, because—

3. The officer does not certify that the person making the acknowledgment was either known or proven to him to be either Matthew Maume or Matthew Waldron Maume. He was, therefore, wholly unidentified, and there is no guaranty whatever that the real Matthew Maume ever saw, and much less executed the pretended deed.

Argument for Appellants.

4. The officer who made the certificate had no power to take the acknowledgment. A "Consular Agent" is not one of those authorized by our statute to take acknowledgments. He is not a consul, vice consul, or even a *deputy* consul. He is a local agent, *appointed* by the *consul* to discharge certain specific duties, and having no general powers. But if this was otherwise, yet a consul has no power to depute a special authority given to him by statute, and that does not itself authorize him thus to delegate it.

There was also a subscribing witness, "P. Lynch," and his signature was not proven or accounted for in any manner. Had the deed itself been produced, it could *only* have been omitted after *both* were proven. It will not be pretended that the copy was *better* than the original would have been! If so, then a party unable to prove his deed has only to lose it, get a certified copy, and avoid the difficulty.

It will not be pretended that the original could have been read until the signatures of the grantor and the witness were both proven.

II. The tax deed to Ryan was improperly excluded. The only objection was, that it had not been set up by supplemental answer, and the right under it had accrued subsequent to the commencement of this action. It was not necessary to set it up at all. It proved (as it was not objected to for insufficiency, or on any other ground than that it was after the commencement of this action) that another party was the owner of a part of the lot at the time of the trial. The statute provides for the case where the plaintiff's title has terminated after the suit is commenced, and directs that the judgment shall be according to the fact.

Here the plaintiff recovered by this decision of the Court, the *whole lot*, and *damages* for its *detention*, when evidence, the validity of which was not questioned, was offered, that proved that as to a part, his title had terminated, and he had no right to its possession. If there could be any doubt as to its admissibility on the first ground, there can be none as to defendants' right to put it in evidence in reduction of damages. He would

Argument for Respondent.

yet be liable to Ryan for the use of his part of the lot, and thus would be compelled to pay for it twice. (See particularly *Tustin v. Faught*, 23 Cal. 237; *Moore v. Tice*, 22 Cal. 513.)

G. F. & W. L. Sharp, for Respondent.

The statute of 1860, (p. 358,) provides "that instruments embraced in section one of the Act, may be read in evidence, under the same *circumstances and rules* as are now or may be hereafter provided by law for using copies of instruments duly executed and recorded; provided, that proof shall be first made that the instruments, copies of which it is proposed to use, were *genuine* instruments, and were in truth *executed* by the grantor or grantors therein named."

The existence and genuineness of the original was conclusively established.

No objection was taken that the existence of original was not proven by the best evidence, that is, by the subscribing witness. Hence, such an objection cannot be taken for the first time in this Court. (*Doe v. Ross*, 8 Dowl. 389.)

The statute does not require such proof, and the construction sought to be placed upon it would take all force from the statute, because the proof insisted upon would prove the instrument without the aid of the statute.

It was absurd to contend that proof must be offered as to the signature of the subscribing witness, on the introduction of a *certified copy*. (*Jackson v. Vail*, 7 Wend. 125.)

This Court has dispensed with proof of the subscribing witness, even when original is introduced. It requires only proof of the signature of the "*party to be charged*," which is the sensible rule. (*Hurlburt v. Jones*, 25 Cal. 225.)

Again: The deed was executed out of the jurisdiction of the Court—*beyond seas*. Both the grantor, grantee, and subscribing witness, were at the time of trial in Ireland, which, in itself, dispensed with all other proof *even at common law*. (1 Green. on Ev., § 572.)

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The certified copy was also admissible, independent of the statute of 1860, under *Mott v. Smith*, 16 Cal. 552.

The tax deed offered by appellants was properly ruled out, because it was not pleaded. (*Hastings v. McKinley*, 1 E. D. Smith, 273.)

By the Court, CURREY, J.

Ejectment for one hundred vara lot Number Three Hundred and Nine, in the City of San Francisco. Both parties claim the property as derived from one Mathew Maume, the common source of title. The plaintiff claims under a deed from Maume to one Michael Dundon, dated January 15, 1859, and a deed from Dundon to himself, dated May 10, 1861. The defendants claim through a Sheriff's deed bearing date the 11th of June, 1861, made in pursuance of a sale under an execution issued upon a judgment in favor of one Timothy Gleason against said Maume, rendered on the 27th of October, 1860.

The plaintiff at the trial offered in evidence a certified copy of the deed from Maume to Dundon. But to lay a proper foundation for admitting in evidence a copy of the deed under the second section of the Act supplementary to the Act concerning conveyances, passed April 30, 1860 (Laws 1860, page 357,) the plaintiff proved by a witness that he had seen a deed in the hands of Dundon which was executed by Maume, of which the certified document offered in evidence was a copy. The defendant objected to the introduction of the same in evidence, on the ground that the certificate of acknowledgment of the deed was not by an officer authorized by law to make it, and also that the certificate was in form and substance insufficient.

The acknowledgment purported to have been made before, and certified by Michael R. Ryan, styling himself "Consular Agent of the United States for the port and district of Limerick." When this was done a Consular Agent was not an officer empowered by the statute, concerning conveyances, to take and certify the acknowledgment of the execution of a

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deed conveying real estate, and therefore this certificate was ineffectual as evidence. Besides this, it was radically defective, as it failed to show that Maume was known to the officer or proved to him to be the person described in or who executed the conveyance. But, notwithstanding the insufficiency of the acknowledgment, the deed was recorded in one of the books of record of deeds in the county in which the lot is situate, on the 20th day of November, 1859.

The first section of the Act of 1860 provided that all instruments of writing which were then copied into the proper books of record of the office of County Recorder of the several counties of this State should thereafter be deemed to impart to subsequent purchasers and incumbrancers, and all other persons notice of all deeds, etc., to the extent that the same were then recorded, copied or noted in such books of record, notwithstanding any defect, omission or informality existing in the execution, acknowledgment, certificate of acknowledgment, recording or certificate of recording the same.

The second section of the same Act declared that duly certified copies of such instruments might be read in evidence under the same circumstances and rules as then were, or thereafter might be provided by law for using copies of instruments duly executed and recorded; *provided* that proof should be made in the first instance that the instruments, copies of which should be offered in evidence, were genuine instruments, and were in truth executed by the grantor or grantors therein named.

* Since this Act became the law of the State, it has so remained. It here becomes important to know under what circumstances and rules of law copies of deeds duly executed and recorded could be used as evidence when this action was tried.

The thirtieth section of the Act concerning conveyances, passed in 1850 (Laws 1850, p. 252,) provided that a deed of conveyance of real estate duly acknowledged or proved, certified and recorded in the manner prescribed in that Act, might be proved by producing in evidence the record thereof, or the transcript of such record certified by the Recorder under the

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seal of his office; provided, it should first be shown to the Court that such deed was lost or not within the power of the party wishing to use it.

Under the Act here referred to, it was incumbent on a party who resorted to proof of a deed by producing a copy of it certified as prescribed, to establish the fact that the deed itself was lost or beyond his control, before he could avail himself of the use of a copy. In 1851 the Act concerning County Recorders was enacted, the twenty-first section of which reads as follows: "Copies of all papers duly filed in the Recorder's office, and transcripts from the books of records kept therein, certified by the Recorder to be full, true and perfect copies or transcripts, shall be received in all Courts, and in all actions and proceedings with the like effect as the original instruments, papers and notices recorded or filed, could be if produced."

This provision of the Act of 1851, gave to a certified copy of a deed duly filed in the Recorder's office, or which being so filed was duly recorded the like effect as evidence as the original of which it was a copy. The certified copy of a duly filed and recorded deed was proof of the execution of the deed, because the execution of it by the grantor necessarily had to exist as a condition precedent to its becoming duly filed in the Recorder's office, or to its becoming duly recorded. Then when, after the passage of this Act, a copy of a deed, duly filed and recorded, might be given in evidence in an action in a Court of justice, it became of equal probative force as the original deed would have been, had it been produced and its execution proved, and then given in evidence. (*Powell's Heirs v. Hendricks*, 3 Cal. 430.)

The deed from Maume to Dundon, as found copied in the book of records, was not duly filed for record nor duly recorded, because it was not acknowledged or proved so as to entitle it to be filed and recorded, and therefore a certified copy of the deed as it stood recorded did not prove the genuineness and due execution of the deed itself; and hence it was necessary, in order to make the certified copy evidence, to prove the existence of the original deed, and that it was executed by the

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person purporting in the copy thereof to be the grantor. For this purpose evidence was introduced of the execution by Mathew Maune of the deed of which the certified copy obtained from the Recorder was given in evidence. No objection seems to have been made to this species of evidence on the ground that the plaintiff had not shown to the Court that the original was lost or not within his power; and if such an objection had been made, we do not see how it could have prevailed without disregarding the twenty-first section of the Act of 1851, provided the deed in question, with the certificate of the Consular Agent, is to be deemed of a character falling within the purview of the Act of 1860; and that it was and is of such character we must hold in the affirmative upon the construction of that Act by this Court in the cases of *Wallace v. Moody*, 26 Cal. 387, and *Landers v. Bolton*, 26 Cal. 393.

Another objection was made to the introduction of this copy of the deed, which was that as from the copy produced, the deed purported to have been executed in the presence of an attesting witness, it was not competent to prove its execution otherwise than by him.

The deed was executed in Ireland, and the presumption is that the subscribing witness resided and remained there, and being a resident of a foreign country at the time of the trial, it was competent to prove the execution of the deed without producing the attesting witness, or otherwise accounting for his absence beyond the jurisdiction of the Court. But it is insisted on the part of the defendants that the handwriting of the attesting witness to the absent deed should have been proved before admitting the certified copy in evidence. The questions of law herein involved have been fully considered in the case of *Landers and Wife v. Bolton*, 26 Cal. 393, and to that case and the authorities therein cited, we refer in justification of the ruling of the Court below.

The plaintiff having established a case which entitled him to recover the demanded premises, the defendants offered to show that one of the defendants had acquired title thereto by

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a deed bearing date on the 11th of June, 1861, through a judgment obtained by Timothy Gleason, on the 27th of October, 1860, against Mathew Maume, in an action commenced in the District Court of the Twelfth Judicial District, in and for the City and County of San Francisco, on the 2d day of November, 1859; and for this purpose the defendants proposed and offered to produce in evidence the judgment roll and all the proceedings in the case of Gleason, plaintiff, against Mathew Maume and others, defendants, and the deed of the 11th of June, 1861. The plaintiff objected to the evidence so offered on the ground that the record in that case showed that the Court acquired no jurisdiction of the person of the defendant, Mathew Maume, and the objection was sustained.

The defendants' counsel have directed their argument very fully to the point that the Court below erred in excluding the evidence so offered, and on the side of the plaintiff the questions involved in this point made on the part of the defendants, have been elaborately discussed. We have examined this jurisdictional objection interposed by the plaintiff, and regard it as well founded. The same question exists in the case of *McMinn* against *Whelan and O'Connor*, (reported in this volume,) and to our opinion in that case we refer for the reasons for our determination respecting the judgment in the case of *Gleason* against *Maume*.

For the purpose of showing that as to a portion of the demanded premises the title had passed to one of the defendants since the action was commenced, the defendants offered in evidence a tax deed executed on the 19th day of July, 1862, by the Tax Collector, to the defendant, R. F. Ryan. This evidence was objected to by the plaintiff, on the ground that it could not be given in evidence without pleading it by supplemental answer, and the objection seems to have been sustained, though the record is somewhat ambiguous on the point, and to this ruling the defendants excepted.

The two hundred and fifty-sixth section of the Practice Act provides that "in an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action

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was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact; and the plaintiff may recover damages for withholding the property." The plaintiff's right to recover a specific portion of the property, the defendants proposed to controvert by matters arising after the commencement of the action and two months before the trial. The fact proposed to be proved by the tax deed was affirmative matter and should have been set up by a supplemental answer, and then the plaintiff would have been apprised of what he would in such event have been required to meet. Facts which occur subsequent to filing an answer materially affecting the rights of the respective parties to the advantage of the defendant, and which if in evidence would necessarily change the result to the detriment of the plaintiff, should be embodied in a supplemental answer to authorize evidence of them without the plaintiff's consent. (*Van Maren v. Johnson*, 15 Cal. 311.) Whether the tax deed would have constituted evidence of a transfer of any portion of the premises to the grantee therein named it is not necessary to decide in this case. It is enough that it was objected to at the threshold for the reason assigned. Its exclusion by the Court, which we hold to have been correct, also excludes the question as to its validity from consideration.

The defendants also offered in evidence a judgment of a Justice's Court, obtained by George E. Worn against Michael Dundon and others, and proposed, further, to prove that an execution was issued on this judgment and that a sale was made thereunder of Dundon's interest in the premises, and that the defendants had become the assignees of the certificate issued to the purchaser at such sale. The plaintiff objected that the proposed evidence should have been pleaded as an equitable defense, and the Court sustained the objection. It does not appear, by the offer or otherwise, when the sale under this judgment was made. If the time for redemption had not expired, the evidence was wholly incompetent to establish any right in the defendants, either legal or equitable, to the

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possession of the premises. If the time for redemption had passed, the defendants should have obtained their deed to which they would have been entitled, and then interposed their new defense by a supplemental answer. There can be no doubt of the correctness of the decision of the Court in excluding the evidence which the defendants thus proposed to give.

The defendants allege that the Court erred in refusing to postpone the trial of their cause upon the motion and affidavits in support of it, and also in refusing their application to be allowed to amend their answer so as to obviate the objections interposed by the plaintiff to the evidence offered by the defendants and excluded by the Court. Matters of this kind rest very much in the discretion of the Court, which should be exercised for the promotion of just ends, and in the case before us we are of opinion this discretion was properly exercised.

Judgment affirmed.

Mr. Chief Justice SANDERSON expressed no opinion.

J. G. DOLL v. JOHN ANDERSON.

WAIVER OF JURY.—A jury may be waived by the parties by a failure to file with the clerk, at least six days before the commencement of the term at which the action may be tried, a notice that a jury will be required.

RIGHT OF COURT TO SUBMIT ISSUE OF FACT TO A JURY.—The Court has a right to direct an issue of fact to be tried by a jury, notwithstanding the parties have waived the same by a failure to give notice at least six days before the commencement of the term that one will be required.

A CONTRACT ASSIGNABLE.—A contract where the owner of a stallion leases him for a season for a sum of money agreed on, and reserves the right to have the horse cover nine mares during the season, is assignable, and the assignee, who is also the purchaser of the horse from the owner is entitled, to all the benefits arising out of the contract.

SAME.—Before the assignee of such contract is entitled to the benefit of the same he must give notice to the lessee that he has purchased the same.

THE PRESUMPTION OF LAW IS THAT THE EVIDENCE WARRANTED THE VERDICT.

—If the jury in their verdict necessarily pass on a material question of fact, the appellate Court will not reverse the judgment on the ground that

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there was no evidence to warrant the verdict, unless a motion is made for a new trial, and a statement made which shows that no evidence was introduced to prove the fact. The presumption of the law is that there was evidence to sustain every material fact found by the jury.

ORDER OF PRODUCING TESTIMONY ON TRIAL.—The assignee of a contract who claims under it may introduce it in evidence before giving proof that the opposite party had notice of its assignment.

APPEAL from the District Court, Second Judicial District, Tehama County.

John P. Welsh was the owner of a stallion, and on the 18th day of February, 1862, he contracted in writing with the plaintiff, to deliver him the horse for one year from that date. The defendant was to pay him one thousand dollars for the use of the horse for the year, and Welsh reserved the right to have the horse cover ten mares, to be brought to such place as the plaintiff might stand him in the State of California; provided, that no mares in Tehama County, or any county adjoining thereto, other than those owned by Welsh, should be included in the number. Plaintiff had the privilege of keeping the horse two years at the same rate.

On the 6th day of September, 1862, Welsh sold the stallion to defendant, and assigned to him the contract. Afterwards, plaintiff elected to keep the horse for another year.

The defendant had nine mares served by the horse in the season of 1863. Plaintiff brought this action to recover nine hundred dollars for the use of the horse in covering the mares. Defendant recovered judgment, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

The Court, as a matter of law, erred in admitting the contract and assignment in evidence, without proof that plaintiff had notice thereof. It was said by Mr. Justice Baldwin, in *Jackson v. Feather Water Company*, 14 Cal. 25: "The rule is that every error is *prima facie* an injury to the party against whom it is made, and it rests with the other party clearly to

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show, not that probably no hurt was done, but that none could have been done by the error."

Adverse counsel seem to say in their brief that this Court must presume there was evidence showing notice to Doll of the assignment previous to the service of the mares, and quotes, in italics, the certificate of the judge to the effect that both plaintiff and defendant testified as to the question whether plaintiff had notice.

We will concede that the error would be cured, if the statement had said there was evidence before the jury tending to show that Doll had notice of the assignment before the mares were served—but there is nothing of the kind; the statement simply says *the plaintiff and defendant both testified as to the question whether the defendant had notice of the assignment*. Now, the Court will mark that the Judge don't say how they testified, nor whether they testified that plaintiff had notice, nor whether the burden of the testimony was to that effect that he had notice, nor, if he had notice, whether it was before or after the service of the mares, nor whether both parties testified alike on the question, nor that there was a conflict in the testimony.

Townsend & Combs, for Respondent.

By the Court, RHODES, J.

Upon the calling of this cause for trial the defendant demanded a jury, and the plaintiff objected to a trial by a jury on the ground that the defendant had waived a jury by failing to file a notice that a jury would be required six days before the commencement of the term. The Court overruled the objection and the plaintiff excepted. That decision is now assigned as error.

It is provided by section twenty-three of the Act of 1863, concerning grand and trial jurors, that "a jury shall be deemed waived unless the parties, or one of them, to the action or proceeding, shall, at least six days before the commencement

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of the term at which the same may be tried, file with the Clerk a notice that a jury will be required," and there can be no doubt that a jury may in that manner be waived by the parties. The Court, however, has the right, notwithstanding such waiver, to direct an issue of fact to be tried by a jury. Besides this, it would not be presumed that any injury had accrued to the plaintiff in consequence of the issues of fact being tried by a jury instead of the Court.

The contract made by the plaintiff and Welsh was assignable, and the defendant, as the assignee of the contract and the purchaser of the horse from Welsh, was entitled to all the benefits arising out of the contract and the ownership of the horse that Welsh would have been entitled to, had he continued to be the owner of the horse and the contract.

The remaining error assigned by the plaintiff is, "That the Court as a matter of law erred in admitting the contract and assignment in evidence without proof that plaintiff had had notice thereof." The appeal is taken from the judgment, and the record contains, besides the judgment roll, a statement on appeal, which appears to have been settled and certified as a bill of exceptions and as a statement on appeal, by the Judge of the District Court. The statement sets out the contract and its assignment, the fact that they were offered in evidence, that the plaintiff objected to their admission on the ground that the defendant had not proved notice to the plaintiff of the assignment, that the objection was overruled and the evidence admitted; and that the defendant duly excepted to the decision. The statement contains none of the evidence in the case except the contract and its assignment to the defendant and the bill of sale of the horse, by Welsh to the defendant, and it does not affirmatively appear that all the evidence in the case, or all that relates to the question of notice of the assignment is set out in the statement, but on the contrary it appears from the certificate to the statement that evidence was given upon that point, for it is stated in the certificate that "The plaintiff and defendant both having been sworn and having testified before the jury upon the trial of the cause

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as to the question whether the plaintiff had notice of the assignment of the contract prior to the service of the mares by the horse." The defendant in his answer alleges that the plaintiff had "actual and full notice" of the sale of the horse and the assignment of the contract to the defendant before the "season" of 1863. The argument of the plaintiff shows that this is an allegation of a material fact in the case. The verdict having been for the defendant, the presumption, in the absence of a motion for a new trial on the ground that such material fact in the case had not been proven, and of a statement in some part of the record, showing that no material evidence was introduced to prove the fact, is that the fact was sufficiently proven before the jury to warrant their verdict. The objection of the plaintiff to the introduction in evidence of the contract and assignment on the ground stated, does not show whether any evidence of notice to the plaintiff had then been introduced, and certainly it does not tend to show whether or not such evidence was subsequently given by either or both of the parties. The objection amounts in substance to this—that the defendant should not have been permitted to prove the assignment of the contract until after he had proven notice thereof to the plaintiff; that is, that the proof of notice should precede the proof of the fact, of which notice was given. The contract and its assignment were admissible in evidence before proof of notice to the plaintiff was introduced; but if the notice was not proven before the jury in some stage of the proceedings, then the important question discussed by the learned counsel for the plaintiff, as to the effect of the absence of proof of notice, would arise, and probably would be held to be a material question in the plaintiff's motion for a new trial, if he had moved for a new trial and had assigned as the cause the insufficiency of the evidence in that respect to justify the verdict. But we are not authorized from the mere statement of the plaintiff's ground of objection to the admission of the contract and its assignment to presume that no evidence was given during the trial, of notice to the plaintiff, and thereupon to determine the consequences flowing from the

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failure of the defendant to notify the plaintiff of the assignment of the contract.

Judgment affirmed.

JOHN B. FRISBIE v. JOHN R. PRICE.

CONTRACT FOR SALE OF LAND AS EVIDENCE.—In an action for the recovery of real estate, a contract in writing signed by both plaintiff and defendant, for the sale and conveyance of the land in dispute by plaintiff to defendant, is admissible in evidence on behalf of plaintiff, for the purpose of proving that defendant obtained possession of the premises from plaintiff, and went in under him.

NOTICE TO QUIT.—A landlord cannot maintain an action to recover possession of land from a tenant at will without first giving him notice to quit.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

Moore & Laine, for Appellants.

Whitman & Wells, for Respondent.

By the Court, SANDERSON, C. J.

This is an action to recover real estate. The plaintiff avers seizin and possession on the second day of June, 1862, and entry and ouster by the defendants on the same day. The complaint is not verified, and the answer, after denying generally all the allegations of the complaint, proceeds and avers: First—That all the title or claim which the plaintiff has to the land in controversy is derived from a pretended Spanish grant, which has been rejected and declared null and void by the Supreme Court of the United States; and that said land is public land belonging to the Government of the United States. Second—That the defendant, John R. Price, has taken up and holds said land under the possessory Act of this State, and had done so prior to the alleged entry and ouster. Third—That the defendant, Mary E. Price, is the wife of her co-

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defendant, John R. Price, and has therefore been improperly joined as a defendant. Fourth—That plaintiff's cause of action has not accrued within five years, etc.

The trial was by the Court, without a jury. The findings and judgment were for the plaintiff as against John R. Price, and as to Mary E. Price, the plaintiff took a nonsuit.

The defendants offered no evidence, but after the plaintiff had closed his case, moved for a nonsuit, which was denied; and the question presented for our consideration is whether the plaintiff was entitled to recover upon his testimony.

It appears that the plaintiff sought to recover as landlord and upon notice to quit; and to make out his case he offered in evidence two instruments in writing, one signed by himself and the defendant John R. Price, and the other by himself and Mary E. Price. Both are contracts for the sale and conveyance of the land in question. The first was dated on the 20th day of February, 1856, and the last on the 24th day of December, in the same year. At the foot of the first appears a release by Price of all his interest in the contract, dated on the 23d of December, being the day next preceding that on which the contract with his wife was executed. At the time these instruments were offered, the counsel for plaintiff stated that they were offered solely for the purpose of proving that the defendants obtained possession of the premises from the plaintiff, and went in under him. Both instruments contain a covenant that the defendants may enter, possess and enjoy the premises until a breach of the contract on their part. Both of these instruments were objected to by the defendants upon the ground that they were "irrelevant, immaterial, and incompetent testimony." The objection was overruled, and the defendants excepted.

Both instruments were certainly relevant, material and competent for the purpose of proving that the defendants received the possession from the plaintiff, and, inferentially, a prior possession in him, which was all that was claimed for them. So far as the purposes for which they were introduced are concerned, the fact that Price had released his interest in the first,

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and the fact that his wife had no capacity in law to make the second, is of no consequence. They were, nevertheless, written admissions, by both of the defendants, of the prior possession of the plaintiff, and that they obtained their possession from him. It is obvious from the date of the release of the first and the date of the second that the release of the first was made merely to clear the way for the second contract, for some reason which does not appear, and not for the purpose of changing the substantial relation of the parties, or the tenure by which the defendants held the premises. Doubtless all parties supposed that the wife had legal capacity to make the second contract, and it was intended as a substitute for the first. The first contract was ended by the release by Price and acceptance thereof by the plaintiff, and the second was a nullity for the want of capacity in one of the contracting parties; but although thus of no account as contracts, they were still good as evidence to show from whom and upon what terms the defendants obtained possession of the premises.

The plaintiff next introduced two papers purporting to be notices to quit by plaintiff to each of the defendants. They were objected to by defendants, upon the ground that they were irrelevant and incompetent. The objection was overruled and the defendants excepted.

They were neither irrelevant nor incompetent. The action was between landlord and tenants at will, and in order to give the former a right of action notices to quit are necessary.

Judgment affirmed.

Mr. Justice CURREY expressed no opinion.

**E. M. HALL, B. C. ALLEN, AND HENRY HUBBARD v.
THE AUBURN TURNPIKE COMPANY.**

POWER OF ITS OFFICERS TO BIND A CORPORATION.—The officers of a corporation have no power to execute the note of the corporation for a debt having no relation to its business, due from a third person to the payee, nor can

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they ratify such note after its execution. A note made for such purpose creates no liability in the payee's hands against the corporation.

EVIDENCE IN SUIT AGAINST A CORPORATION.—In an action brought against a corporation by the payee of a note executed by its officers in the name of the corporation, for a debt due the payee from a third person, and having no relation to the business of the corporation, evidence that the note was not given for the debt of the corporation is admissible under an answer denying the execution of the note.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The defendant was a corporation. The following is a copy of the note sued, and on which plaintiffs failed to recover:

“AUBURN, April 1st, 1863.

“Eight months from date, for value received, The Auburn Turnpike Company promise to pay Hall and Allen, at their banking house in Auburn, in gold coin currency of the United States, three thousand two hundred and four dollars, with interest at two per cent per month from date until paid. The above indebtedness is subject to a claim held by Marriner and Willard, of \$5,500.

“\$3,204.

“J. R. CRANDALL, President.

“E. M. BANVARD, Secretary.”

The following is a copy of the ratification of the note made by the Directors of the corporation, and entered on the book of records of the company:

“AUBURN, April 14th, 1863.

“The directors of the Auburn Turnpike Company met pursuant to call of the President, in Auburn, on Tuesday, April 14th, A. D. 1863; present, J. R. Crandall, James Neall, and E. M. Banvard. On motion, *Resolved*—That the President and Secretary of the company are hereby authorized to borrow, on the credit of the company, a sum of money not exceeding three thousand five hundred dollars, and issue the company's note therefor.

“*Resolved*—That the note given to Hall & Allen on the 1st day of April last, by the President and Secretary, for the sum

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of three thousand two hundred and four dollars, (subject to the demand of Marriner & Willard,) is hereby ratified and considered a part of the loan authorized in the above resolution.

[Signed:]

"J. R. CRANDALL, President.

"E. M. BANVARD, Secretary."

Tuttle & Fellows, for Appellants.

Tweed & Craig, for Respondent.

By the Court, SAWYER, J.

This is an action on two promissory notes, claimed to have been executed by defendant in favor of plaintiffs. Judgment was rendered for plaintiffs on the first note set out in the complaint, and against them on the second. Plaintiffs appeal from the judgment.

The Court finds as follows, viz: "The second note, set up in the second count of the complaint, was given to secure the personal indebtedness of one E. M. Banvard to plaintiffs, and no part of the consideration of said note was received by defendant, or went to its benefit. The said Banvard was individually indebted to plaintiffs, who wanted security for such indebtedness, and the note in question was given as such security. After the note was given, it was ratified and approved by the Board of Directors of said turnpike company defendant, by an order spread upon the minutes to that effect."

The officers of a corporation have no power to authorize the execution of a note as surety for another in respect to a matter having no relation to the corporate business, and in which the corporation has no interest. Such a transaction is not within the scope of its business, and a party receiving such note with notice of the circumstances under which it is given cannot recover on it. (1 Parsons on Notes and Bills, 166; *Bank of Genessee v. Patchin Bank*, 13 N. Y. 309; Angell and Ames on Corp., Secs. 257 and 258.) The note in question was given to plaintiffs for a debt due them from Banvard, one of the Directors of the corporation, and creates no liability in the

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plaintiffs' hands against the corporation. The Directors acted without authority in making and ratifying the note, and it is, therefore, not the note of the corporation.

The only other point is, that the evidence showing the note to have been given for a debt due from Banvard was improperly admitted, for the reason that the facts constituting the defense were not pleaded. The answer denies the making and delivery of the note by defendant, and the evidence introduced establishes the fact that the making and delivery of the note was not the act of defendant. It shows that there never was any liability. There is no confession and avoidance. The evidence was admissible under the issues.

Judgment affirmed.

CHARLES L. WILSON v. SAMUEL BRANNAN.

MORTGAGE OF PERSONAL PROPERTY.—The mortgagee of personal property may, after the conditions of the mortgage are broken, upon giving reasonable notice to the mortgagor of the time and place of sale, sell the property mortgaged at public auction, and if the sale be *bona fide*, an absolute title to the property passes to the purchaser.

MORTGAGEE OF PERSONAL PROPERTY HAS TWO REMEDIES.—The mortgagee of personal property has two remedies, either of which he may pursue at his election. He may resort to a Court of equity to foreclose the mortgagor's right to redeem, or to compel a redemption, or he may obtain the same object by a fair public sale of property after due notice to the mortgagor.

NOTICE OF SALE OF PERSONAL PROPERTY MORTGAGED.—What is a reasonable notice to the mortgagor of the time and place of sale at auction of personal property mortgaged, must be determined from all the circumstances of each particular case, and he who alleges that a notice is not sufficient must assign some reason for his allegation.

SALE OF PERSONAL PROPERTY PLEDGED.—Personal property pledged to secure a debt may be sold by the pledgee, after the debt to secure which it was pledged has become due, if the sale be made at public auction and after reasonable notice of the time and place of sale be given to the pledgee.

RIGHTS OF MORTGAGOR IN PERSONAL PROPERTY MORTGAGED.—The mortgagor of personal property has an equity of redemption in the mortgaged property after the conditions of the mortgage are broken, which he may assert by paying the debt and redeeming the property at any time before this equity of redemption has been cut off by a foreclosure or by a sale at auction.

RIGHT OF MORTGAGOR TO REDEEM PERSONAL PROPERTY.—If the mortgagee of personal property refuses, after condition broken, to allow the mortgagor to

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redeem the property mortgaged, the mortgagor may assert this right by a bill in equity, if he brings his suit within a reasonable time.

RIGHT OF ONE OF TWO MORTGAGEES OF PERSONAL PROPERTY.—If a mortgage on personal property is made to two persons, to secure the separate debt of each, either mortgagee, after condition broken, may advertise and sell at public auction the undivided interest which he holds in the property as security for his debt, and the purchaser will become a tenant in common with the owner of the unsold portion.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The plaintiff appealed from the order refusing the injunction.

The other facts are stated in the opinion of the Court.

Cook, and Hittell, for Appellant.

Can the mortgagee of a chattel mortgage in California sell the mortgaged property without a judicial foreclosure?

It is well known that the old common law doctrine regarded a mortgage as an absolute sale of the property mortgaged, to be defeated upon the performance of the condition; and this doctrine applied as well to mortgages of personal as of real estate. But the equitable interposition of the English chancery early changed the rule in regard to real property, and it soon became settled law that real mortgages were mere securities and that there could be no sales of mortgaged real estate by the mortgagee without foreclosure. In regard to chattels, on account probably of their being sold with delivery, and easily transferred from hand to hand, the old idea of absolute sale upon condition subsequent had a firmer hold; and it will be seen that such sales, which are still possible as to personal though not as to real estate, still occur, and are more or less confounded in the books with what we now understand to be meant by the term "mortgage" — that is to say, a security in contradistinction to a sale on condition.

The mortgage of the present day, unless the nature of the transaction or the express terms of the contract show otherwise, is regarded as a mere security, and resembles what was known in the old common law and in the civil law, as a pledge.

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While the notion of a mortgage being a sale upon condition remained, it was held that the property upon default became absolute in the mortgagee. But from the earliest times there was a recognized distinction between such mortgages in the way of conditional sales and mortgages in the way of securities, or pledges.

Glanville, the earliest of writers on the common law whose works have come down to us, says that a loan is sometimes made on the security of a pledge, (*sub vadii positione*) and the pledge may consist of chattels, lands, or rent. Sometimes possession is immediately given of the pledge on receipt of the loan, and sometimes it is not. Sometimes the thing is pledged for a term, and sometimes without. When a chattel is pledged, and possession is given, and for a certain term, the creditor is bound to keep the pledge safely, and not to use it to its detriment. If it be agreed that, in case the debtor should not redeem the pledge at the end of the term, the pledge shall remain with the creditor as his own property — the agreement must be observed. But if there be no such agreement, and there be a fixed time of redemption, and the debtor make *delay* in payment, the creditor may quicken the redemption by a writ (of which he gives the form) and which requires the debtor without delay to redeem (*acquietet rem quam invadiavit*) the pledge. On the return of the writ, if the defendant confessed the pledge, he was commanded to redeem in a reasonable time, and on default, the creditor had license to treat the pledge as his own. But if the pledge was made without mention of any particular term, the creditor might (*debitum petere*) demand his debt at any time, and the debt being discharged, the creditor was bound to restore the pledge without any deterioration.

And Mr. Chief Justice Kent, from whose opinion we cite the above extract, regards the doctrine laid down by Glanville, and followed by a number of early cases in England, which he also refers to, as correct. The property was to be considered as a mere deposit to be detained as security. (See *Cortelyou v. Lansing*, 2 Caines' Cases, 203.)

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It is unnecessary to particularly cite the old cases upon this subject; but it may be stated generally that one series of them, commencing in *Capper v. Dickinson*, 1 Rolle, 315, followed the notion of a conditional sale, and the other series that of a pledge in the way of security. The case in Rolle went so far as to hold that if the property was not redeemed at the day, it was forfeited; and this decision, though as rigorous and as odious as the *lex commissoria* of Rome, which it resembled, was no more than the logical and legitimate result of the premiss upon which it was based, namely, an absolute sale upon condition subsequent. It never could properly or equitably be applied to cases of delivery of property in the way of security, or to a case, such as the one at bar, where the delivery was expressly as "collateral security" and in no respect as a sale.

The same reasons in favor of the equity of redemption, which apply to a mortgage of real estate, apply to a mortgage of personal property; and there is no good reason why the law should be different in respect to the two cases. We do not deny that there are cases, and some comparatively late ones, in which the old doctrine that a mortgagee after default may sell upon notice, is repeated; but we believe that in all those cases the term "mortgage" was misapplied, and that the contracts embraced something more than mere security, and either amounted to absolute sales with conditions of defeasance, or expressly contained powers of sale. (See *Hart v. Ten Eyck*, 2 John. Ch. 99; 2 Story Eq. Jur. § 1,033; *Wheeler v. Newbould*, 16 N. Y. 392.)

We therefore feel safe in affirming, that by the general rules of law, unless a power of sale is expressly given or necessarily to be implied from the nature of the contract, there is no authority in a mortgagee to sell personal property without a judicial foreclosure.

In California, as we have intimated above, we do not know that the point has ever been raised; but all the decisions in regard to real estate mortgages and the nature of mortgages in general, as well as a fair construction of our statutes, lead

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irresistibly in our opinion to the conclusion that whatever may be the law in England, and other States, in California there can be no nonjudicial sale of pledged or mortgaged personal property except under an express power. (*Goodenow v. Ewer*, 16 Cal. 461; *Smith v. '49 and '56 Quartz Mining Co.* 14 Cal. 242; *Johnson v. Sherman*, 15 Cal. 287; *Dutton v. Warschauer*, 21 Cal. 609; Practice Act, Sec. 246.)

J. W. Winans, for Respondent.

The common law doctrine that a mortgagee of chattels has the absolute title, subject only to be defeated by performance of the contingency, and may sell or otherwise dispose of them after forfeiture, is asserted in *Tucker v. Williams*, 1 Peere Williams, 261; *Lockwood v. Ewer*, 2 Atk. 303; *Westerdell v. Dale*, 7 Term, 306, 312; *Ryall v. Rowles*, 1 Vesey, 365, and elsewhere. It is thus clearly set forth in *Parker v. Banker*, 22 Pick. 46: "The law appears to be well settled, both in England and in this country, that the pledgee of personal property, after the debt becomes due, may sell without a judicial process and a decree of foreclosure, upon giving reasonable notice to the debtor to redeem. It was so decided in *Tucker v. Wilson*, 1 P. Wms. 261, and in *Lockwood v. Ewer*, 2 Atk. 303. The same rule of law was laid down in *De Lisle v. Priestman*, 1 Browne's Penn. Rep. 176, and in New York by Mr. Chancellor Kent, in *Hart v. Ten Eyck*, 2 Johns. Ch. 100, and again in his Commentaries, 2 Kent, 3 ed. 582. The principle thus settled seems to be founded in good sense, and may be essentially necessary to enable the pledgee to avail himself of his pledge in a reasonable manner, for the discharge of his demand." This doctrine of the Supreme Court of Massachusetts is also sanctioned in Alabama. "By the contract of mortgage," (says the Court in *Brown v. Lipscomb*, 9 Porter, 475,) "the title was vested in the mortgagee, subject to be divested by the payment of the money on or before the day stipulated. On the failure to pay, the title became absolute, and the mortgagee had nothing but an equity of redemption.

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the possession having accompanied the mortgage." And, again, it has been so held in Missouri: "It is well settled that a mortgagee of personal chattels, after the day of redemption has passed, is regarded in law as the absolute owner." (*Robinson v. Campbell*, 8 Missouri, 366.) And in the same case, page 616, the Court thus decides: "Unquestionably, after forfeiture, the mortgagee has the legal title — is, in the eye of the law, the absolute owner of the chattels. It is difficult to conceive of a title of this character accompanied with such restrictions as to prevent its transfer to another. How can a man be said to be the absolute owner of a chattel, and yet unable to make any valid disposition of that chattel, by sale, gift, or otherwise?" Such is also the view taken in New Jersey; for says the Court, in *Hall v. Snowhill*, 2 Green's N. J. 18: "The mortgage is a grant *in presenti*, subject to be defeated on payment of the money intended to be secured. The legal title to these chattels passed by the mortgage, and vested in the plaintiff." And the same principle prevails in North Carolina. (*Holmes v. Hall*, 3 Dev. N. C. 98.) In *Flanders v. Barstow*, 6 Shepley, Maine, 357. the Court sanctions the doctrine.

Although the character and effect of real mortgages have changed under the influence of modern decisions, yet no such change has taken place in regard to personal mortgages, nor has the distinction between real and personal mortgages been removed or affected by modern rulings.

The whole reasoning of appellant is based upon the proposition that there is no difference between real and personal mortgages, and that the decisions of this Court in reference to mortgages on real estate apply with equal force to mortgages on chattels. "Is it not evident," he says, "that the Legislature not only did, but intended to place personal property mortgages upon the same footing as real, and in both to take away the right claimed under the strict old notion of the common law to belong to the mortgagee, of selling without a judicial foreclosure?" This view of appellant is neither sustained by reasoning, analogy, or the authorities. The distinc-

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tion between real and personal mortgages is just as decided and just as arbitrary now as it was a century ago, and just as absolute in this State as elsewhere. Our Supreme Court has in no instance applied its decisions affecting real mortgages to those upon the personalty. Indeed, the very reasoning of those decisions shows them inapplicable to the case of chattels.

On the other hand, the case of *Wildman v. Radenaker*, already cited, and the case of *Smith v. '49 and '56 Quartz Mining Company*, 14 Cal. 242, sustain the distinction which we claim. But let us examine what the books say upon this point. "There is a wide difference," holds the Court in *Stewart v. Slater*, 6 Duer, 99, "between a mortgage of lands and a mortgage of chattels. In the first case, as the law in this State is now settled, the estate, subject to the mortgage, remains in the mortgagor, is bound by a judgment, and may be sold under an execution against him; the mortgage is regarded merely as a security for the debt, and not as a transfer of the title. But a mortgage of personal chattels in all cases vests the legal title in the mortgagee, and when by the terms, or by the legal construction of the instrument, he has an immediate right to the possession, although the possession may not in fact have been changed, he is, in judgment of law, the absolute owner, and it is merely as his bailee, and by his sufferance that the mortgagor retains the possession." Here we are furnished with a description, both full and clear, of the difference between a mortgage on real and one on personal estate. Again, the distinction between them is as important and absolute in regard to remedies as in regard to rights. Thus Mr. Chancellor Kent says, in *Hart v. Ten Eyck*, 2 Johns. Ch. 99, 100: "It seems now to be admitted (though Lord Chancellor Harcourt once held otherwise) that the creditor who holds the stock in mortgage is not bound to wait for a bill of foreclosure and decree of sale, as in the case of a mortgage on land, but may sell on reasonable previous notice to the creditor to redeem. * * * But if a freehold estate be held by way of mortgage for a debt, then it may be laid down as an invariable rule that the creditor must first obtain a decree for a sale under a bill of fore-

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closure." The learned Chancellor proceeds to say, that for a party holding *land* in pledge, to sell the same at his own pleasure, "would open a door to the most shameful imposition and abuse;" which remark, appellant, by an easy but not very ingenious transition, has assumed the author to have applied to sales of personal instead of real property. The opinion of the Court, in *Butler v. Miller*, 1 Comstock, 500, is equally explicit. "*A mortgage upon real estate*," they declare, "is a mere security upon the land, and gives the mortgagee no title or estate therein whatever." Now this is precisely what this Court has determined in the cases quoted by appellant, and in other cases. Does it then follow that a personal mortgage is in the same category? Hear what the New York Supreme Court says in continuation: "Whereas a personal mortgage is more than a mere security, it is a *sale of the thing mortgaged*, and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition." This question, then, is here fully passed upon by the Supreme Court of a State whose system of jurisprudence is analagous to our own, or rather identical, since we have preferred the appropriation of her system to the adoption for ourselves of any independent plan.

By the Court, CURREY, J.

This case has come to this Court on an appeal from an order refusing to grant an injunction. The respondent being about to sell at auction certain personal property, mortgaged or pledged to him by the appellant, the latter filed a complaint to prevent the sale, and obtained an order requiring respondent to show cause why an injunction should not issue as prayed for, and a further order temporarily restraining the sale. The respondent appeared and showed cause, and thereupon the injunction was refused and the temporary restraining order discharged.

The facts of the case are in substance as follows: On the 10th day of June, 1861, respondent loaned to appellant seventy-

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five thousand dollars, and one William A. Dana loaned him fifteen thousand dollars; for the payment of these sums, one year from that date, with interest at the rate of two per cent per month, appellant gave his promissory notes, to wit: to the respondent a note for fifty-thousand dollars and a note for twenty-five thousand dollars, and to said Dana a note for fifteen thousand dollars. To secure the payment of these notes at their maturity, appellant executed and delivered to the respondent and Dana, a chattel mortgage of personal property consisting of four hundred tons of iron and one hundred bonds of the California Central Railroad Company of one thousand dollars each, with a quantity of cars and locomotives not then set up and put together, all of which property was at the time delivered to the mortgagees. The parties at the time contemplated that the appellant should thereafter have possession of the cars and locomotives, and it was agreed between them that they should be set up and put together when a new mortgage under and in accordance with the provisions of the Chattel Mortgage Act of 1857 (Laws 1857, p. 347,) should be executed, by which the mortgagor should mortgage to the same mortgagees the cars and locomotives so put together, and then the same should be delivered to the appellant. The cars and locomotives were accordingly set up and their construction completed in October, 1861, when the new mortgage was executed and the cars and locomotives were delivered to the appellant. This new mortgage was given not only to secure the sum of money specified in the first mortgage, but also the further sum of ten thousand dollars loaned to appellant by respondent on the 20th of June, 1861. The iron and bonds were held by respondent and Dana in possession under and subject to the mortgage first executed, and after the execution of the second mortgage the appellant held the possession of the cars and locomotives under and subject to its provisions.

The first mortgage contained therein apt words of bargain and sale of the property described and declared to be delivered by the mortgagor to the mortgagees, but it was also declared that such sale was intended as collateral security for

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the payment of certain promissory notes described, given by the appellant to the respondent and to Dana respectively, which were payable, according to their tenor and effect, on the 10th of June, 1862, with interest at a specified rate; and it was provided by the mortgage that if the notes should not be paid at maturity the mortgagees or their assigns should have power to foreclose as to the property sold and delivered, or to subject the same in any legal manner to the payment of the sums of money advanced to the mortgagees respectively, with interest according to the tenor and effect of the notes.

The first mortgage also provided that the mortgagor should give to the respondent and Dana additional security in case it should be ascertained that the property mortgaged was insufficient as security for the amount of his indebtedness to them, and by the complaint it appears that afterwards, in June, 1862, eighty-five second class bonds of the California Central Railroad Company, each of which was in the sum of one thousand dollars, were delivered to the respondent as an additional security in pursuance of the stipulation in the mortgage thereto relating, and it is alleged in the complaint that at the time the last mentioned bonds were delivered they were so delivered with the understanding and on the condition that the appellant should have a reasonable extension of time to allow him to make negotiations for raising money to discharge the mortgages and the debts thereby secured. The respondent, by his answer, denied that these bonds were delivered to him with the understanding and condition alleged, but, on the contrary, averred that they were delivered in pursuance of the stipulation so to do contained in the mortgage first executed.

The notes made and delivered to the respondent remaining unpaid, he gave notice to the appellant on the 15th of February, 1863, that unless the same were paid and the iron and the bonds mentioned in the first mortgage, and the eighty-five bonds given as additional security, were redeemed, he, the respondent, would cause the same, to the extent of the respondent's interest, together with the appellant's equity of redemption therein, to be sold at public auction on the 28th day of

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the same month of February, at a particular hour of the day and at a place specified. This notice also stated that such sale would be made at the time and place designated after giving public notice thereof for eight days in the *Alta California* newspaper. Such notice was first published in the newspaper named on the 20th of February, 1863, and this action was commenced on the 24th of the same month.

The question raised and to be determined is, whether the mortgagee or pledgee of goods and chattels delivered to him by the mortgagor or pledgor as security for the payment of a debt at a particular day can sell the property after the debt has become due, in the manner proposed by the respondent in this case.

The iron and bonds which are involved in this controversy were not a part of the property mentioned in the second mortgage, and as security, could only be subjected to sale under the first mortgage, in some mode sanctioned by the law of the land, other than the Chattel Mortgage Act of 1857. By the seventeenth section of the Act concerning fraudulent conveyances and contracts (Laws of 1850, p. 267), it is provided that "no mortgage of personal property hereafter made, shall be valid against any other persons than the parties thereto, unless possession of the property be delivered to and retained by the mortgagee." When this statute was passed, the common law had been adopted by legislative enactment. (Laws 1850, p. 219.) And as between the parties to a mortgage of chattels, their rights were to be determined by the rules of the common law on the subject. (*Wildman v. Radenaker*, 20 Cal. 617.)

The first mortgage seems to have been executed and the property delivered to the mortgagees, with the view to conform to the requirements of the seventeenth section of the Act concerning fraudulent conveyances and contracts. By the common law a grant or conveyance of goods in gage or mortgage passes the legal title conditionally to the mortgagee, and if the goods are not redeemed at the time stipulated, the title becomes absolute at law, although equity will interfere to compel a redemption. (Story on Bailments, Sec. 287.)

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The Supreme Court of New York, in *Langdon v. Buel*, 9 Wend. 83, held that a mortgagee of personal property, upon failure of the mortgagor to perform the condition of the mortgage, acquires an absolute title to the property. This, say the Court, is well established to be the legal effect and operation of a chattel mortgage. The same doctrine is laid down in *Brown v. Bement*, 8 John. 96; in *Ackloy v. Finch*, 7 Cow. 292; in *Case v. Boughton*, 11 Wend. 109; in *Patchin v. Pierce*, 12 Wend. 61; in *Smith v. Acker*, 23 Wend. 667, 668; in *Burdick v. McVanner*, 2 Denio, 171; in *Fuller v. Acker*, 1 Hill, 475; and in *Butler v. Miller*, 1 Coms. 500. To these might be added many decisions to the same effect of the highest Courts of that State. The same doctrine in substance was held by the Supreme Court of Missouri in *Williams v. Roger*, 7 Mo. 556, and in *Robinson v. Campbell*, 8 Mo. 366, 615; by the Supreme Court of Alabama in *Brown v. Lipscomb*, 9 Porter, 475; by the Supreme Court of Maine, in *Flanders v. Barstow*, 18 Maine, 357, and by the Court of Errors and Appeals of Mississippi in *Thornhill v. Gilmer*, 4 Sm. & Marsh, 153. The Supreme Court of New Jersey held, in *Hall v. Snowhill*, 2 Green, 9, 18, that the mortgagee of personal property is considered the true owner, and has a right to the actual possession and control of it in the event of the non-payment of the debt due him from the mortgagor—that the mortgage is a grant *in presenti*, subject to be defeated on payment of the money intended to be secured.

The cases which hold that at law the title of the mortgagee to the chattels mortgaged becomes absolute upon the breach of the stipulation to pay at a particular day, recognize that the mortgagor has an equitable right or interest in the property of which he may avail himself by paying the debt due and thus redeeming the property; and as long as the right of redemption remains in the mortgagor, it may be said, viewing the subject from an equitable stand-point, that the title of the mortgagee is not to every intent absolute. In mortgages of personal property there exists, after condition broken as in mortgages of land, an equity of redemption, which may be

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asserted by the mortgagor, if he brings his suit to redeem within a reasonable time. (2 Story's Eq. Jur. Section 1,031; *Westbrook v. Kemp*, 1 Vesey, 278.)

The argument on the part of the appellant is to the effect that the mortgagee of personal property is limited to the remedy of judicial foreclosure for the purpose of subjecting the property to a sale for the satisfaction of the debt due. The rule that prevails in relation to the foreclosure of mortgages on real property is invariable that the creditor must obtain a decree of a competent Court for a sale of the mortgaged premises, unless the mortgage deed provides otherwise for the sale of the lands mortgaged. (*Hart v. Ten Eyck*, 2 John. Ch. 99, 100; *Fogarty v. Sawyer*, 17 Cal. 593.) But Judge Story says (2 Story's Eq. Jur. Section 1,031): "There is a difference between mortgages of land and mortgages of personal property, in regard to the rights of the mortgagee, after a breach of the condition. In the latter case there is no necessity to bring a bill of foreclosure; but the mortgagee, upon due notice, may sell the personal property mortgaged, as he could under the civil law, and the title, if the sale be *bona fide* made, will vest absolutely in the vendee. And it makes no difference whether the personal property mortgaged consists of goods or of stock, or of personal annuities," and he cites cases and elementary authorities in support of the doctrine thus declared. (See, also, 2 Story's Eq. Jur. Secs. 1,008, 1,009; Story on Bailments, Sec. 309, and the authorities cited; *Patchin v. Pierce*, 12 Wend. 61.)

The mortgagee has two remedies, either of which he may pursue at his election. He may resort to a Court of equity to compel a redemption or to foreclose the mortgagor's right to redeem, or he may obtain the same object by a fair public sale of the property after due notice to the mortgagor. (*Charter v. Stevens*, 3 Denio, 35.) The mortgagor's right of redemption remains until foreclosure by judicial sentence in the one case, or sale after due notice in the other; and this right may be enforced in equity. (Powell on Mortgages, Sec. 1,041, and cases before cited.)

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Personal property pledged may in like manner be sold after the debt which it was delivered to secure has become due, if such sale be made at public auction and upon reasonable notice thereof to the pledgor (*Mauge v. Heringhi*, 26 Cal. 577;) or, if the pledgee prefers, he may file a bill in a Court of equity against the pledgor for a foreclosure and sale. (Story on Bailments, Sec. 310; Edwards on Bailments, 249, 250.)

Whether the iron and bonds delivered be regarded as a pledge or mortgage can make no practical difference, as in either case the mode of subjecting the security to sale for the payment of the debt may be the same, and hence we have made no reference to the distinction to be found in the books between a pledge and mortgage, and we deem it unnecessary in disposing of the case before us to do so. (See on the subject, *Wilson v. Little*, 2 Coms. 445; *Dewey v. Bowman*, 8 Cal. 148.)

It is insisted on the part of the appellant that the two hundred and forty-sixth section of the Practice Act is virtually a denial of any right in the mortgagee to any other remedy for the recovery of a debt or the enforcement of a right secured by a mortgage or other lien on personal property than by an action. The statute generally denominated the Practice Act, is an Act to regulate proceedings in civil cases in the Courts of justice in this State, and the language of the two hundred and forty-sixth section providing that there shall be but one action for the recovery of any debt or the enforcement of any right secured by mortgage or lien upon real or personal property must be understood as relating to civil actions commenced and prosecuted in the Courts of justice of the State, and not to embrace and control proceedings sanctioned by the common law, which in no just legal sense can be called actions at law or suits in equity.

Notwithstanding the general doctrine that real property mortgaged can only be subjected to sale for the payment of the debt thereby secured, by judicial decree, in the absence of any express power granted by the mortgagor to sell and convey the premises for the payment of the debt, the Court in

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Fogarty against *Sawyer*, 17 Cal. 593, held that a sale of mortgaged real estate might be made in accordance with the conditions of the power, and that a sale so made would pass to the purchaser a good title upon its consummation by a conveyance. If a sale of real property could be made under a power granted in the mortgage, we see no reason why a sale of personal property, mortgaged or pledged, could not be made for the debt secured by it and due, under the authority conferred on the mortgagee by the law of the land.

It is maintained by the appellant that as the two mortgages had relation to one and the same transaction, and as the second mortgage could not, under the provisions of the Act of 1857, be enforced otherwise than by judicial foreclosure, that therefore the mortgagee could not proceed under the first mortgage to an enforcement of payment of the debt in any other mode than by an action in a Court of equity to obtain a foreclosure and a decree for the sale of the mortgaged property. Though the object of the second mortgage was to secure the debt for which the first was given, it does not follow that the first mortgage, as to the iron and bonds, was in any degree affected by the second. In fact it is manifest that the second mortgage was intended, as originally contemplated, as a substitute for the first only so far as the cars and locomotives were concerned.

If it had not been the purpose of the parties that the appellant should have the possession of the cars and locomotives, there would have been no necessity for the second mortgage, and it is fair to presume it would not have been executed except to preserve the security on the portion of the property delivered to the appellant. It is by the first mortgage alone that the mortgagees have any lien on the iron and bonds, and their rights in respect thereto are the same as they would have been if the second mortgage had not been executed.

The respondent and Dana were joint mortgagees, holding the property mortgaged and in their possession as security for the debts due them respectively in the proportions that their respective demands bore to each other, and it is suggested on

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behalf of appellant that the respondent could not proceed to sell the property to the extent of his interest in it without the co-operation of Dana. The respondent did not propose to sell any greater proportion of the property than the undivided interest which he held as security for his own debt. That he might do so is decided in *Tyler v. Taylor*, 8 Barb. 387. The purchaser at such sale of the undivided interest would become the owner of such interest or share as a tenant in common with the owner of the remaining and unsold portion of the property, and hold it discharged of the appellant's former equity of redemption.

The objection that the notice to the appellant calling on him to redeem, and of the sale, was not a reasonable notice, we think is not well founded. The appellant was aware that the debt had at that time been due for more than eight months, and it does not appear that he had any valid reason for delaying payment, nor does it appear that the period of thirteen days within which he was at liberty to redeem after notice given, was not sufficient if he could redeem at all. In *Willoughby v. Comstock*, 3 Hill, 389, the Court held that a notice of two days of the time and place of sale was sufficient, and it is not pretended in this case that a notice for thirty or sixty days, or even for any longer period, would have been of any advantage to the appellant. In the absence of any positive rule of law or established custom on the subject, the reasonableness of the notice as to time must be determined from all the circumstances of the particular case; and he who alleges that a notice in this respect is not sufficient, should assign some reason for his allegation.

From an attentive examination of all the questions presented and argued by the learned counsel for the respective parties, we are of the opinion the Court below properly decided the case and that the order should be affirmed.

Mr. Justice SHAFER expressed no opinion.

Statement of Facts.

BERNARD SCHROEDER v. CARL JAHNS, ADMINISTRATOR, WITH THE WILL ANNEXED, OF HERMAN SCHROEDER, DECEASED.

PLEADING STATUTE OF LIMITATIONS.—The general allegation in an answer, that the action is barred by the statute prescribing two or any other number of years as the limitation for bringing the action, is not the correct method of pleading the Statute of Limitations.

LIMITATION OF ACTIONS IN CASES OF TRUST.—A deposit of money by one with another to be held by him in trust for the depositor until he shall demand it, constitutes an express continuing trust, and no right of action will accrue to the *cestui que trust* until the trustee assumes a position in hostility to the trust relation, either by refusing to pay the money on demand, or by some other act, nor will the Statute of Limitations commence running until a demand is made for the money, or the trustee has violated his contract.

SAME.—In such case if no demand be made on the trustee, and he does not violate his contract in his lifetime, but demand is made on his administrator after his death, the Statute of Limitations does not commence running against the intestate, but the cause of action accrues against the administrator.

ANSWER SETTING UP STATUTE OF LIMITATIONS.—If the complaint in an action against an administrator avers that the intestate received plaintiff's money in his lifetime, to keep the same for plaintiff as the depository thereof until the same should be demanded of him, and that the money remained in the intestate's hands at the time of his death, subject to plaintiff's order, an answer which sets up as a defense that the cause of action did not accrue to plaintiff within two years next before the death of the intestate, and that the same is barred by the Statute of Limitations, does not raise any issue in the case.

DEFECTIVE FINDING OF FACTS.—If the answer sets up a counterclaim and the Court finds that the defendant introduced no evidence as to the counterclaim, the finding is defective; but if the evidence is all before the appellate Court, and it appears that no testimony was introduced by either party as to the counterclaim, the judgment will not be reversed on account of the defective finding.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The Court below found the following facts, viz:

That between the first day of January, 1853, and the death of the deceased, Herman Schroeder, there was deposited with and collected by said Herman Schroeder money to the amount of two thousand nine hundred dollars, to be held by him on deposit and in trust for the plaintiff, and was so held by him at the time of his death, with the exception of three hundred and forty-seven dollars paid by said Herman Schroeder, in his lifetime, to the said plaintiff, leaving a balance in said Her-

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man Schroeder's hands, at the time of his death, of two thousand five hundred and fifty-three dollars; and it appearing from the pleadings that said claim was duly presented to the defendant as administrator with the will annexed of the estate of the said Herman Schroeder, that the same was rejected by the defendant, and the action brought therein within the time required by the statute.

The defendant excepted to the finding of the Court for insufficiency, and the Court then made the following amendments to its findings:

1st. After the word "Schroeder" insert the words: "And more than four years before the death of said Herman Schroeder or the commencement of this action, to wit, in the month of January, 1853."

2d. After the word "Statute" add the words: "That no evidence whatever was introduced by defendant of the defense set up in his answer, that deceased in his lifetime had paid, laid out, and expended for plaintiff, and at his request, large sums of money, amounting to one thousand dollars, or any sum paid, laid out, and expended by deceased for plaintiff except the sum of three hundred and forty-seven dollars, for which credit is given by the plaintiff in his claim against said estate, and allowed in this finding."

James B. Townsend, for Appellant.

The judgment appealed from is *erroneous*, because, first, the finding of the Court, *as amended*, did not *dispose* of the issues made by the second and third defenses set up in said defendant's answer. These defenses were, respectively, that the cause or causes of action sued on, if any ever existed, did not accrue to said plaintiff within the periods of *two* nor *four* years, respectively, next before the death of the said Herman Schroeder. These two *different periods* of time were plead because it was not then known whether the plaintiff's evidence of the receipt of money by the deceased would be *in writing*, or by parol merely.

The defendant contended on the trial that the *cause of action*

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accrued when the money was *received* by the deceased. On the other hand, the plaintiff contended that a *demand* was necessary before any cause of action accrued. It was necessary, therefore, that the Court should determine by its finding, not only *when the money was received*—because that would not necessarily decide the issue—but when the *cause of action accrued*, which included not only the *fact* of the receipt of the money, but likewise, the *manner* in which and the purposes for which it was received; and whether received in such manner and for such purposes as to render a *demand* necessary before a cause of action would exist—and if so, then the *fact* of the *making of such demand*, and *when* it was made.

1st—The Statute of Limitations ran against the demand proved, from the *time of the receipt* of the money by the deceased. (*Buckner v. Patterson*, Litt. Sel. Cases, 234; *Hickok v. Hickok*, 13 Barb. 632; *Dale v. Birch*, 3 Camp. 347; *Farnam v. Brooks*, 9 Pick. 243, 244; *Kane v. Bloodgood*, 7 John. Ch. 110, 111, 114; *Robinson v. Hook*, 4 Mason, 151, 152.)

2d—If a *demand* were necessary in a case of this kind, before the bringing of an action, it is well settled that such demand must be made *within the statutory period*, or the claim will be barred. (*Codman v. Rogers*, 10 Pic. 119, 120; *Stafford v. Richardson*, 15 Wend. 305-307; *Lafarge v. Jayne*, 9 Penn. 410; *Chalfin v. Malone*, 9 B. Mon. 498.)

P. G. Buchan, for Respondent.

The complaint avers that the money was left with Herman Schroeder in trust, to be paid when demanded; the proof establishes it, and the Court finds it. The relation of trustee and *cestui que trust*, as between Herman and Bernard, therefore existed—it was an *express* trust. The statute in such case does not commence to run from the time of making the contract in reference to the deposit, but from the breach of it; that is, from the time of a demand and refusal.

This is a plain elementary principle. The principle is fully recognized in the case of *Baker v. Joseph*, 16 Cal. 174. The case of *Baker v. Joseph*, is much stronger for the defend-

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ant than this case. In that case the money was deposited to be invested by defendant in loans at interest, and the principal and interest to be paid to plaintiff on request. It might have been urged in the Baker case, that the defendant had a right to loan it to himself, and his so appropriating it turned it into an ordinary contract. But, in the case before us, there was no such authority. The money was deposited to be safely kept till demanded. In the case of *Baker v. Joseph*, the Court say, that "whether he loaned it or not, or whatever the responsibilities incurred for not loaning it, the repayment of the money received was not to be made until demanded by plaintiff;" and that in that case the statute does not commence to run until demand made.

The rule is distinctly laid down by Mr. Chancellor Kent, in *Decouche v. Sabitica*, 3 John. Ch. 216, that so long as a trust subsists, the right of a *cestui que trust* cannot be barred by the length of time during which he has been out of possession.

In *Phelps v. Bostwick*, 22 Barb. 314, it is expressly decided that "a bailee or depositary is not liable to an action until demand and refusal; therefore, where money has been left with another, in *naked deposit*, for the benefit of the owner, the latter cannot maintain an action to recover it until a demand has been made upon the depositary to return it, and he has refused so to do."

The principles in reference to trusts of this character, and the principles governing the relation of trustee and *cestui que trust*, so far as they have any reference to this case, will be fully illustrated by a reference to the following cases: *Coster v. Murray*, 5 John. Ch. 531; *Murray v. Coster*, 20 John. 558; *Brown v. Cook*, 9 John. 361; *Beardslee v. Richardson*, 11 Wend. 25; *Day v. Roth*, 18 N. Y. 452.

By the Court, RHODES, J.

The plaintiff sued the defendant, as the administrator of Hermann Schroeder, deceased, to recover a balance due him for moneys before that time deposited by him with Hermann

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Schroeder; and he charges that Hermann Schroeder¹ received the moneys "in trust for the said plaintiff, to be kept by him, the said Hermann Schroeder, as a depositary thereof, until the same should be demanded by him the said plaintiff;" that he promised to keep the same in safe deposit for the plaintiff, subject to his order, and that the same remained in the hands of Hermann Schroeder at the time of his death subject to the order of the plaintiff; and he also charges that he presented his claim for the moneys against the estate of the deceased to the defendant, as administrator, who rejected the same. The defendant fully denies the alleged indebtedness of his testator, and that he received or held the moneys of the plaintiff in any manner, and he sets up the Statute of Limitations of two years, and of four years, in separate answers, and he alleges, by way of counterclaim, that the plaintiff is indebted to the estate of the deceased in the sum of about one thousand dollars, for moneys laid out and expended, etc., by the defendant's testator.

Judgment was rendered for the plaintiff upon the finding of the Court, and the defendant appeals from the judgment and the order denying his motion for a new trial.

The first point relied upon by the defendant is that the finding of the Court did not dispose of the issues made by the second and third defenses of the Statute of Limitations, but as the statute of four years is clearly inapplicable to the facts of the case, and as the argument of counsel applies equally to both defenses, the second defense, setting up the limitation of two years, will alone be considered in this connection.

The defendant alleges in that defense that the causes of action did not accrue to the plaintiff "within two years next before the death of the said Hermann Schroeder, and that the same, if any, are barred by the statute prescribing limitations for the bringing of actions in this State."

The last clause of the defense—that the cause of action is barred by the statute—is not a statement of a fact, but of a conclusion of law. The fact averred in the defense is that the cause of action did not accrue within two years next before

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the death of Hermann Schroeder; and it will be observed that this fact does not constitute a defense to the action, for the complaint alleges that Hermann Schroeder, at the time of his death, still held the money as a depositary for the plaintiff, and there is no charge that he had done anything inconsistent with the contract between the parties, or was in any manner in default, and therefore no cause of action is alleged to have accrued against him; but the cause of action is alleged to have accrued against the defendant who, on demand being made, rejected the plaintiff's claim for the money deposited with his testator. The fact alleged in the defense, instead of being in denial, is consistent with the facts stated in the complaint, and does not raise an issue in the case. We do not intend, however, for those reasons to dispose of the point raised by the defendant without further consideration, for the parties have treated the answer as sufficient to form the issue of the Statute of Limitations, and in this respect they have but followed the practice prevailing to a considerable extent in this State—though we think erroneously—of setting up the Statute of Limitations by means of the general allegation that the action or the cause of action is barred by the statute prescribing two or any other number of years, as the limitation for bringing the action.

That portion of the case relating to the sum of one hundred dollars collected by Hermann Schroeder for the plaintiff may be left out of view, because the plaintiff has remitted from the judgment the amount constituting that item in his account.

The transaction stated in the complaint—the depositing of the money by the plaintiff with Hermann Schroeder, to be held by him in trust for the plaintiff, until the plaintiff should demand it, and the receipt of the money by Hermann Schroeder, with the promise on his part to hold it as such depositary, subject to the order of the plaintiff—constituted an express and direct trust. (*Kane v. Bloodgood*, 7 John. Ch. 111, and cases cited.) The trust was also a continuing trust, within the principles of the case of *Baker v. Joseph*, 16 Cal. 173. This is not one of those “technical and continuing trusts which

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are not cognizable at law, but are creatures of the Court of equity," for in case of a breach of the contract to safely keep, or to pay over the money on demand, the *cestui que trust* has his action at law. The relation of trustee and *cestui que trust* would continue, so long as the trust was a subsisting one, manifested as such by the acts or declarations of the parties, and no right of action against the trustee would accrue until he assumed a position in hostility to the trust relation. So long as he held the money on deposit for the *cestui que trust*, ready to be paid over to him on demand, the *cestui que trust* could not maintain an action against him to recover the trust property. If the trustee has not, by act or declaration, manifested a determination to repudiate the trust, and violate the contract under which the money came to his hands, there must be a demand by the *cestui que trust* for the money and a refusal, before he is liable to an action for the money. This principle necessarily grows out of the relation the parties have assumed, and is too clear to require either argument or authority in its support. The Statute of Limitations, therefore, would not commence to run in such case unless the demand was made. The only demand alleged is the one made upon the administrator.

The Court finds that the money was deposited with the testator "to be held by him on deposit and in trust for the plaintiff, and was so held by him at the time of his death," etc. The defendant objects that the finding does not specify the kind of deposit that was made and says that a deposit may be made for many different purposes; but we think the objection untenable. The very definition of a deposit is a naked bailment of goods to be kept for the bailor, without reward, and to be returned when he shall require it. (See Bouvier's Law Dic.; Jones' Bailee, 36, 117; Story, Bailees, Sec. 41.) No other purpose would be implied than what the term itself imports, in the absence of any fact tending to show a deposit for another purpose. The finding shows that the depository held the property at the time of his death in the same capacity in which it came to his hands. No presumption could be indulged in of a demand upon and a refusal by the depository,

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for the presumption would be that he had at all times complied with his agreement with the *cestui que trust*. The fact found that at the time of his death he still bore his original relation to the property — that is, that he remained such depository — holding the property in trust for the depositor, to be returned to him on demand — negatives any presumption that the depository had assumed a position in hostility to the trust.

It is alleged in the complaint and not denied in the answer, that a demand for the money deposited was made of the defendant as administrator, and that he rejected the claim for the money. It is not doubted that the rejection amounted to a refusal to return the money deposited with his testator. The cause of action accrued at that time, and the Statute of Limitations commenced from thence to run. The facts found by the Court, together with the facts in the case, that stand as admitted by the failure to deny them, completely meet the defendant's answer of the Statute of Limitations, and show that the two years had not elapsed since the cause of action accrued. While agreeing with counsel for the defendant that the Court must find as to the truth of every issue of fact found in the case, we think the finding need not be directly and pointedly made that each of the several allegations of the complaint or the answer is or is not true, but if the Court finds such facts as will be sufficient, with the facts admitted by the parties to be true, to necessarily determine every material issue in the cause, the requirement of the law in that respect will be satisfied.

The defendant further objects to the finding on the ground that the Court failed to find the acts as to the counterclaim. The finding, as amended after it was objected to by the defendant, is in substance that no evidence was introduced by him of that defense, except of the sum of three hundred and forty-seven dollars, for which credit was given in the plaintiff's claim, and which was allowed in the finding. The finding does not respond to the issue, and technically it is incorrect, for the statement is not that there was no evidence introduced of the counterclaim, but that the defendant introduced none.

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If there was any evidence in the case tending to prove the counterclaim beyond the amount allowed, the finding would be held to be defective and erroneous; but the defendant made a statement in support of his motion for a new trial, in which is contained "all the evidence given" in the cause, and upon an examination of the statement no evidence is found therein tending to prove the counterclaim, beyond the amount allowed the defendant. If the Court had passed directly upon the issue, the finding would have been against the truth of the facts set up in the defense, except as to the amount allowed the defendant. The finding is technically erroneous, but the error has not operated to the prejudice of the defendant, and will, therefore, be disregarded.

The remaining points urged by the defendant do not require separate consideration, as all of them have been answered by the views already expressed, except the one relating to the preponderance of the evidence, and we are not justified in disturbing the finding on that ground.

Judgment affirmed.

WILLIAM REDDING, AND EDWARD P. REED v. JOHN WHITE, AMOS WHITE, LAURA WHITE, AND P. KAMMERER.

POWER TO GRANT OR LEASE PUEBLO LANDS.—Under the Mexican law the power to grant or lease pueblo lands was vested in the municipal authorities; but this power was limited to the granting of house lots for building purposes, and lots two hundred varas square, called *suertes*, for cultivating or planting as gardens, vineyards, orchards, etc.

LEASE OF PUEBLO LANDS.—A lease of four hundred acres of pueblo land for ninety-nine years made by the municipal authorities of a pueblo in California in 1847, was void for want of power in the authorities to make the lease.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

On the 9th day of April, 1863, plaintiffs commenced this action to recover possession of a tract of land in San José,

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designated as Lot Number Forty-nine of the lots commonly called the five hundred acre lots of the Pueblo of San José.

The complaint averred possession and ownership in plaintiffs as tenants in common on the 27th day of May, 1862, and ouster by defendants on the same day. The answer denied the allegations of possession and ownership, and averred that defendants, and those whose title they had acquired, had been in possession of the land sued for for fourteen years. Plaintiffs, to maintain their action, relied on a grant made by the Alcalde of the Pueblo de San José, in accordance with the decree of the Junta and people of the Pueblo. Plaintiffs recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

C. T. Ryland, for Appellants.

The court erred in admitting said pretended loan in evidence, because the Alcalde was not authorized or empowered in any manner to make such an instrument, and because the same conveyed no title or right. The Alcalde does not pretend to make said loan by virtue of any general power in him vested as such officer, but he makes it by authority of certain decrees of the Junta and people.

We have been unable to find in the Spanish or Mexican law any tribunal or power authorized to make grants, known or called "Junta," nor do we find any power given to the people to assemble as a Junta, for the purpose of authorizing Alcaldes or other officers to make grants. "Junta" simply means a meeting or gathering, and there is no power conferred on such to authorize Alcaldes to dispose of pueblo lands.

In the regulations for the government of the Province of California, by Governor Felipe de Neve, dated at Monterey, 1st June, 1779, and approved by the King of Spain, October 24th, 1781, the extent of *suertes* is fixed at two hundred varas square, (a vara is about thirty-three inches English measure.) *Two suertes of irrigable land, and two of dry land*, were all that were given to one person; the rest of the lands were held

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to be granted in the name of his majesty, by the Governor. (Sec. 5, App. 2, Rockwell, 446, 447.)

In the same law it is declared "that the corresponding titles to house lots, lands, and waters, granted to the new pobladores, or *which may hereafter be granted to other residents, shall be made out by the Governor, or Commissary whom he may appoint for this purpose, records of which, etc., must be kept, etc.* (Sec. 17, App. 2, Rockwell, 450.)

From this law, made at Monterey in 1779, and approved by the King, 1781, it would seem that four *suertes* were all that could be granted to an individual; and it further appears that the Governor and his Commissary were alone authorized or empowered to make even such grants or dispositions of the pueblo lands.

T. Bodley, also for Appellants.

W. T. Wallace, for Respondents.

The instrument being shown to be a genuine original official act of the Alcalde, upon its being read in evidence certain presumptions arose; among which was the presumption *that the Alcalde had authority to make the grant*, and that the land granted was inside the boundaries of the Pueblo of San José. (*Cohas v. Raisin*, 3 Cal. 453; *Welch v. Sullivan*, 8 Cal. 188-202; *White v. Moses*, 21 Cal. 40.)

This doctrine of presumption is one that has been indulged in in support of instruments of this character *whenever the question of authority to make the grant was presented, unembarrassed by any question of fraud or forgery.*

In the case of *United States v. Clark*, 8 Peters' U. S. Rep. 448, a royal order of 1790 was recited in the grant, as being the authority upon which it was issued. Of this order, thus recited, the Supreme Court of the United States said: "It most certainly does not authorize that grant * * * and it is not doubted that the quantity contained in the grant far exceeded the quantity authorized by that order." The grant

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in that case was *sustained*, notwithstanding that the authority recited in it was not sufficient to sustain it.

By the Court, SANDERSON, C. J.

The conclusion which we have reached upon the controlling question involved in this case, renders a notice in detail of the several points made by counsel unnecessary. The plaintiffs' title is founded upon an Alcalde grant or lease of the land in controversy for "a term of ninety-nine years, with the right of nine renewals." The quantity of land is described in the lease as five hundred acres, more or less; but, as appears from the record, the actual quantity is a little less than four hundred acres. The grant, upon its face, purports to have been made on the 14th of November, 1847, in accordance with the decree of the Junta and the People of the Pueblo de San José Gde., in Upper California, passed and entered of record on the 29th day of June, 1847, and in accordance with a confirmatory decree of the people of said pueblo, passed in Primary Assembly, on the 30th day of the same month, and entered of record in the office of the Alcalde.

Assuming that the decrees of the 29th and 30th of June fully empowered the Alcalde to make the grant in question, we think they were void for the want of power in the Junta and people of the pueblo, and leaving those decrees out of the case and assuming that the Alcalde made the grant by virtue of the general powers vested in him as such Alcalde, we also think the grant was void for the same reason.

It has been held that the power to grant or lease pueblo lands was vested in the municipal authorities under the Mexican system. (*Cohas v. Raisin*, 3 Cal. 443; *Hart v. Burnett*, 15 Cal. 530; *White v. Moses*, 21 Cal. 34.) But this power, as appears from the same cases, was limited to the granting of house lots for building purposes, called *solares*, and sowing ground for cultivating or planting as gardens, vineyards, orchards, etc., called *suertes*. Upon the question as to how much land a *suerte* embraced, we are cited to no authority,

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except the fifth section of Appendix No. 2, Rockwell's Spanish Law, 440, containing extracts from the regulations for the government of the Province of California, by Don Felipe De Neve, Governor of the same, dated in the Royal Presidio of San Carlos de Monterey, June 1, 1779, and approved by his majesty in a royal order of the 24th October, 1781. It is there provided that each *suerte* of land, whether capable of irrigation or dependent on the seasons (*de riego de temporale*) shall consist of two hundred varas in length, and two hundred in breadth; such being the area generally occupied in the sowing of one *fanega* of Indian corn; and it is further provided that not more than two *suertes* of irrigable land, and other two of dry land, shall be allotted to each of the *pobladores*. If from that time until the cession of California to the United States any change was made in the size of a *suerte*, counsel have failed to produce the evidence of such change, and our own researches have discovered none. But admitting that a *suerte* had no precise limits as to quantity, the word by definition signifies a small, or middling sized lot, suitable for a garden, vineyard, or orchard. In Seoane's Neuman and Baretti's Dictionary the word is defined in English by the word "lot," and the expression *suerte de caña* is defined as each patch or lot into which a large sugar cane field is divided.

Guided by such light as we have we are of the opinion that the municipal authorities under the Mexican law did not have the power which was attempted to be exercised in the present case. We know of no instances where such grants were made except in the Pueblo of San José, and even there not until after the occupation of the country by our own people. This is, of itself, strong if not conclusive evidence of the non-existence of the power. Such a power would have been in direct antagonism to the policy of the Mexican Government as indicated in its laws touching the establishment of towns and villages, and would have retarded and defeated that policy.

For the purpose of inducing colonization and encouraging the building up of towns and villages, a certain quantity of

Points decided.

land was allotted to each to be distributed in small quantities among the inhabitants for building lots and for cultivation upon a moderate scale. In view of the quantity of the land thus allotted and the purposes for which it was allotted, it is apparent to us that leases by the municipal authorities of five hundred acre tracts for nearly a thousand years at a rent of only three dollars per annum could not have been authorized consistently with the end in view.

Judgment reversed and cause remanded.

THE PEOPLE v. WALTER SKIDMORE, WALTER A. SKIDMORE, EGBERT VAN ALLEN, AND LOUIS DENOS.

FORMER JUDGMENT AS A BAR.—If the defendants demur to the complaint for misjoinder of parties defendant, as well as for other reasons, and at the same time answer, and the parties stipulate to submit the issues of law and fact to the Court upon the pleadings, and a general judgment is rendered for the defendants, it is a bar to another suit for the same cause of action, although the real ground upon which the judgment was based was the misjoinder of parties defendant.

EXPRESSION OF OPINION ON A POINT NOT BEFORE THE COURT.—If a judgment is rendered generally for the defendants upon issues of both law and fact, and the Supreme Court upon appeal affirm the judgment, a statement in the opinion that the judgment was affirmed because there was a misjoinder of parties defendant, and that the effect of the judgment will not preclude the plaintiff from suing again, does not prevent the judgment from being a bar to a new suit brought for the same cause of action.

JUDGMENT RENDERED ON DEMURRER AS A BAR.—If the defendants demur and answer at the same time, and issues of law and fact are submitted to the Court, and an order is made sustaining the demurrer by reason of a misjoinder of parties defendant, and judgment is rendered for the defendants upon the order, the judgment will not bar a new action.

APPEAL from the District Court, Seventh Judicial District, Marin County.

Plaintiff recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

John Reynolds, and *S. F. Reynolds*, for Appellants.

Argument for Respondent.

The cause in the former case was fully tried upon its merits, and the judgment there is a perfect bar to this action, and is completely brought within the case of *Gray v. Dougherty*, 25 Cal. 266.

Bradley Hall, for Respondent.

Patterson, Wallace & Stow, also for Respondent.

The parties are not identical. Daniel T. Taylor was a party to the first action; he is not a party to this. He was made a party for the sole purpose of obtaining equitable relief against him. Because he was made a party, his co-defendants demurred, and also because the relief sought against him was equitable, whilst that sought against the obligors was legal.

This Court say: "If the demurrer for misjoinder of causes of action had been sustained — that, and no more — and judgment had been entered for the defendants upon that order, and the plaintiff had appealed, and the judgment had been affirmed, there can be no pretense that the judgment would have barred a new action unaffected with a like misjoinder." The demurrer was not *withdrawn*; it was submitted to the *referee* for decision. The judgment as entered does not, we submit, purport to be rendered upon the *facts* found by the *referee*, for he *found none*; and *one* of the assignments of *error* was that judgment could not be entered by the Clerk without a finding of facts. The demurrer, then, was properly *before* the Court, and the Supreme Court properly considered it and passed upon it. It must be conceded that taking the opinion signed by the Judges, and not the Clerk's entry or conclusion of *what the judgment was*, as the law of the case and as the decision and judgment of the Court, and plaintiffs' right to bring a new action was not barred, the Judges certainly knew what they meant *and intended*, and they expressed *the judgment of the Court* to be that the demurrer was properly sustained; and the language, "We affirm the judgment upon the demurrer for this misjoinder," controls the subsequent words, "judgment is affirmed," and leaves the balance of the decision

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operative—that the affirmance shall not preclude an action upon the recognizance.

The sustaining of the *demurrer* and affirming the judgment for a misjoinder of parties is not a *bar*, any more than an acquittal upon a defective indictment. (4 Cow. 44; 2 Hawk. C. 55; 1 Bulstrode, 142; 2 Hale's Pleas, 248; *People v. Barrett*, 1 John. 66; 13 John. 351.)

By the Court, SHAFER, J.

This is an action upon a recognizance entered into by the defendants to secure the appearance, etc., of W. Skidmore to answer to a charge of murder.

The answer of the defendants denies many of the allegations of the complaint, and sets up a judgment in a former suit as a bar to the action.

The record of the proceedings in the former suit is made part of the transcript by stipulation, and it appears, on comparing the two records, that the actions are identical in subject matter and parties. The only question, therefore, having any connection with the special defense, is whether the judgment in the former action was based upon the merits.

In the complaint in the first suit there was a prayer for equitable relief against D. T. Taylor, trustee in an express trust created by Skidmore for the protection of his sureties against their liability upon the recognizance, and the trustee was to that intent made a party defendant.

The defendants in the first suit demurred to the complaint on the ground of ambiguity, misjoinder of causes of action and parties defendant, and for want of facts sufficient to constitute a cause of action, and they also answered the complaint. Thereafter, on stipulation of parties, an order was entered referring the case to Charles Halsey "to try all the issues of law and fact therein and to report a judgment thereon."

The parties in due time appeared before the referee, and in the first place, as appears by the record, drew up and submitted to him a categorical statement of the matters charged

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in the complaint and admitted by the answer; which list embraced most, if not all, the substantive allegations in the complaint.

The plaintiff thereupon moved that the demurrer be overruled, which motion was denied and the plaintiff excepted.

The plaintiff then moved for judgment against the conusors, upon the pleadings and "admissions of facts as aforesaid in the action at law;" which motion was also denied and the plaintiff excepted.

The plaintiff then "moved for the equitable relief and decree asked for in the complaint, against all the defendants, upon said facts proved and the admission in the pleadings, which motion was then and there denied by the referee, and the plaintiff duly excepted."

The record thereafter proceeds as follows: "And the issues of law and fact raised by the pleadings were submitted to the referee upon the pleadings for his decision, and to report a judgment thereon in the case.

"On the 2d day of July, 1860, the referee filed his report, which is attached to the judgment, finding no facts, but finding as conclusions of law from the facts shown by the pleadings, that defendants are entitled to judgment against the plaintiff, to which decision plaintiff duly excepted.

"On the same day of July, 1860, the Clerk of said Court of Marin, without any order of Court, entered up judgment in favor of the defendants and against plaintiff for costs, the Court then being in session; to which decision and judgment the plaintiff duly excepted."

All the foregoing passages occur in the plaintiff's statement on motion for new trial, and on appeal, in the first action. The statement closes with the following assignment of errors:

The plaintiff, on the motion for a new trial, assigns and will rely upon the following grounds of error:

1. Error of the referee in not overruling defendants' demurrer.

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2. Error of the referee in not granting plaintiff's motion for judgment in the action at law.

3. Error of the referee in not granting plaintiff's motion for judgment in the equity case or cause of action.

4. Error of the referee in deciding as conclusions of law that defendants were entitled to judgment against plaintiff.

5. That the judgment entered in the report of the referee is against law and evidence.

6. That the Clerk of the Court erred in entering judgment without a finding of facts by the referee.

The following is the report of the referee:

The People of the State of California, plaintiff, v. *Walter Skidmore, Walter A. Skidmore, Egbert Van Allen, and Louis Denos*. State of California, in the District Court for the Seventh Judicial District, in and for the County of Marin.—The undersigned, to whom this action was referred to try the issues therein and report a judgment thereon, does report that the said action was submitted by the attorneys for the respective parties thereto upon the pleadings in the same. And from the facts therein stated I do find as a conclusion of law, that the said plaintiff is not entitled to recover, and I do report a judgment upon the issues in said action in favor of the said defendants against the said plaintiff.

July 2, 1860.

CHARLES HALSEY, Referee, etc.

Upon that report the following judgment was rendered:

The People of the State of California, plaintiff, v. *Walter Skidmore, Walter A. Skidmore, Egbert Van Allen, Louis Denos and Daniel T. Taylor*. In the District Court of the Seventh Judicial District of the State of California, in and for the County of Marin.—The above entitled action having been heretofore, by consent of the parties thereto, duly referred to Charles Halsey to try all the issues of law and fact therein and report a judgment thereon, and the said referee having duly made and filed his report thereon, wherein and whereby

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he has found and reported a judgment in favor of the said defendants, therefore it is now ordered, adjudged and decreed by the Court that the said defendants herein do have and recover a judgment against said plaintiff; that they, the said defendants, be hence dismissed without day, and the said plaintiff take nothing by this said action. And it is ordered and adjudged that the defendants do have and recover their costs and disbursements, amounting to one hundred and two dollars and twenty-five cents.

The motion for new trial having been denied, the plaintiff brought the case to the Supreme Court by appeal.

The Court in the opinion say:

We affirm the judgment upon the demurrer for this misjoinder. The effect of the judgment will not be to preclude the plaintiff from suing again when the cause of action can be more formally set out.

Judgment is affirmed.

1. The judgment below was not reversed, either in whole or in part, by the Supreme Court, nor was it modified in any particular; and it follows, if the Court dealt with the judgment at all, it must have affirmed it to the whole extent of its terms. But the nature and scope of the Court's final action is clearly indicated by the words "judgment affirmed," as they occur in the published report of the case. (17 Cal. 261.) We have examined the record, now remaining in this Court, and find an unqualified entry to the effect that the judgment was affirmed.

The Court, in examining the judgment in connection with the errors assigned, found that there was at least one ground upon which the judgment could be justified, and therefore very properly refrained from considering it in connection with the other errors. But the affirmance, still, was an affirmance to the whole extent of the legal effect of the judgment at the time when it was entered in the Court below. The Supreme Court found no error in the record, and therefore not only

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allowed it to stand, but affirmed it as an entirety, and by direct expression.

If the demurrer for misjoinder of causes had been sustained—that, and no more—and judgment had been entered for the defendants upon that order, and the plaintiff had appealed, and the judgment had been affirmed, there can be no pretense that the judgment would have barred a new action, unaffected with a like misjoinder; and hence if the judgment below was in fact based solely upon an ascertained misjoinder of causes of action or of parties, or upon ambiguity in the complaint, or upon all of them combined, or upon any other matter not involving the very merits of the plaintiff's claim, a new action, free from these dilatory infirmities, might have been brought to enforce it. The remark made by the Court in the opinion as to the effect of its own non-reversal, and expressed affirmance of the judgment, was not upon a point then before it in error, and therefore, though eminently entitled to consideration, cannot be considered as *res judicata*, nor even as authority in the exact sense.

2. Assuming, then, that the judgment rendered in the first action is now as it was in the beginning, the question is narrowed to a single point of inquiry: Was the former judgment upon the merits of the claim?

The judgment, howsoever comprehensive in its terms, must be read in the light of the whole judgment roll.

It appears that the issues of law raised by the demurrer, and the questions of fact raised by the answer, were by the stipulation of the parties sent to the referee; that the plaintiff at the hearing, having in the first place agreed with the defendants upon a statement of the facts bearing upon the merits, moved that the demurrer should be overruled. The motion was denied, and, as we presume, upon the ground that it would be irregular to pass upon the merits of a demurrer on motion to overrule it.

The subsequent motion for judgment on the facts, as shown by the pleadings and agreed statement, was also overruled; and as, in one point of view, the motion was a proper one, the

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ruling upon it may be considered as having been in itself a disposition of the case upon the merits. But however that may be, it would seem that the parties, after running the issues of law and fact one after another through the gauntlet of these motions, concluded to begin, and did in fact begin *de novo*; for immediately thereafter the issues of *law* and *fact* were submitted to the referee upon the pleadings for his *decision* and to report a *judgment thereon in the case*.

How did the referee act upon the matters of thought and judgment so committed to him? The answer to this question is to be found in the report.

The report commences with a recital, to the effect that the case was submitted by the attorneys of the respective parties upon the pleadings; and, "*from the facts therein stated*," it finds, as a conclusion of law, that the plaintiff is not entitled to recover, and reports a general judgment in favor of the defendants against the plaintiff.

In view of this sweeping report and the matters that immediately preceded it, we are not at liberty to hold that the general judgment entered upon "the report," in terms, was not entered upon it, and the whole of it, in legal effect. Going by the record, it appears affirmatively that the judgment was based upon the merits of the claim, and not upon the dilatory matters raised by the demurrer nor any other mere technical defect. It may be conceded that the proceedings before the referee were irregular, as they were in some particulars; and it may further be assumed that the judgment was erroneous in view of the facts agreed upon; still, the judgment has never been reversed nor modified, and therefore its efficacy as a bar to this action is impaired neither by the irregularity nor the error.

We have further considered the plaintiff's claim upon its original merits, and our convictions, upon a somewhat hurried consideration of the defendants' objections, are in favor of the claim. But this action is to be decided upon the present legal merits of the claim, and we consider that it is barred by the former judgment.

Argument for Appellant.

In the case of *Phelan v. Supervisors of San Francisco*, 9 Cal. 15, cited for the respondents, the judgment was distinctly upon the demurrer, and the Court, reversing and not affirming the judgment, as here, held that the plaintiff could amend his complaint on application to the Court below. The point decided in that case is not the point presented here, and the distinction is so manifest that a formal statement of it is unnecessary.

‘Judgment reversed and new trial ordered.

RUDOLPH STEINBACH v. JACOB P. LEESE, GEORGE
W. BAKER, AND ALFRED G. JONES *et al.*

SERVICE OF SUMMONS BY PUBLICATION.—Where service of summons is had by publication, proof of the publication can only be made by the affidavit of the printer, his foreman, or principal clerk; and the affidavit should state that the person taking the same holds one of these positions. An affidavit commencing in this way: “A. B., principal clerk, etc., * * being sworn, deposes,” etc., is insufficient, and would not give the Court jurisdiction of the person of the defendant.

WHAT CONSTITUTES AN APPEARANCE IN AN ACTION.—A defendant cannot appear in an action so as to give the Court jurisdiction of his person, except by answering, demurring, or giving plaintiff written notice that he appears; and the service of the notice of appearance must antedate or be contemporaneous with the service of all other notices and papers.

PLAINTIFF PRESUMED TO KNOW DEFECTS IN PROCEEDINGS.—If the plaintiff in an action of foreclosure purchases the property at Sheriff's sale, he is presumed to buy with full knowledge of all defects in the proceedings relating to service of summons.

WRIT OF ASSISTANCE.—If the Court, in an action to foreclose a mortgage, does not acquire jurisdiction of the person owning the land at the time of the foreclosure, a writ of assistance against the owner or his grantees will be refused.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for Appellant.

There was no proof of publication of summons. The affidavit does not show that Hoffman was competent to be a witness on the trial of the action. It does not show that

Argument for Respondents.

Hoffman was the "printer," or his "foreman," or "his principal clerk." Practice Act, section thirty-three, subdivision three—the words "principal clerk in the office," etc., are mere "*descriptio personæ*"—he does not swear that he is such clerk, nor that there was any such newspaper. (*Merritt v. Seaman*, 2 Selden, 171, and the numerous authorities there cited by the Court; *People v. Penin*, 1 How. Pr. R. 75; *Ex parte B. of Monroe*, 7 Hill, 178; *Cunningham v. Gorlet*, 4 Denio, 71.)

It should appear affirmatively and distinctly that Hoffman was the principal *clerk* of the *printer*, because it does not appear his means of *knowledge* of the publication is not disclosed to the Court. (See *Hill v. Hoover*, 5 Wisconsin, 370; and a correct form, 2 Barbour's Ch. 706, which we deem conclusive.)

Brooks & Whitney, for Respondents.

Appellant's counsel objects that the affidavit is insufficient in *reciting* the fact that the deponent is the principal clerk, instead of *stating* that he is the principal clerk.

The cases cited from the New York Reports in support of this position are not cases of the affidavits of publication, and there is a material difference. The cases cited are in point so far as this: that in New York a description of the character of the deponent at the commencement of the answer is not considered as *sworn* to, but is a mere description of the person. But these were cases of the exercise of some private right by individuals. In the case of the publication of a summons there is this difference: that the *Court* designates the paper, and the *law* designates the person who shall make the affidavit, so that *pro hac vice* and *quoad hoc*, he is acting as the officer of the law, and is in no sense the private agent of the party. The form cited from Barbour's Chancery Practice is an affidavit of publication, and is in the form contended for by the counsel. The case of *Hill v. Hoover*, 5 Wisconsin, 370, was a case of proof of publication of a notice of sale, and is in point as far as it goes; but none of these cases were attempts to

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invalidate a judgment on this ground. We might concede that such affidavits were *irregular*, but that is a very different thing from their being *void*.

We think it must be confessed that the criticism is exceedingly nice. In a pleading or affidavit, it is the ordinary way to commence by describing the status of the party as "one of the defendants in this cause," or "the attorney for the plaintiff herein," etc., and "common error may make law." We are free to admit that the form given by Harbour is *better*, but it would be a hard thing that all the judgments which have been rendered in this State on just such affidavits are nullities. If the Court will look at its own records, it will find that the practice has been universal. In the case of *Gray v. Palmer*, 9 Cal. 637, the affidavit of publication seems to have been precisely the same as this. But it never seems to have occurred to the learned counsel who contended in that hotly contested case, or to the Court, that the judgment of *Gray v. Eaton* was void on that ground. The affidavit was criticised and attacked by counsel, and sustained by the Court. The Court say: "When there is but one clerk, his affidavit must be sufficient, and it is unnecessary for him to improperly *describe* himself as principal clerk." It is evident that the Court considered a *descriptio personæ* sufficient.

By the Court, SHAFTER, J.

This appeal is from an order granting a writ of assistance.

The action was brought to foreclose a mortgage executed to Salvador Vallejo by defendant Lease in 1850, which mortgage came to the plaintiff by assignment. The complaint was filed May 1, 1857, and a notice of *lis pendens* was filed on the 30th of the same month. At the time the action was brought, Jones, who was named as a defendant in the complaint, was the owner of a part of the mortgaged premises by title derived from Lease and Yale subsequent to the mortgage. A final decree was entered November 3, 1860, against all the defendants, and the plaintiff became the purchaser of the mortgaged

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premises at the Sheriff's sale, and is now the holder of the Sheriff's deed. The appellants, Brooks, Tenant, Lazarus, and Johnson, claim under their co-appellant Jones, by title derived from him since the filing of the notice of *lis pendens*. The only question is, whether Jones was a party to the foreclosure suit.

On the 24th of September, 1857, an order was made directing the service of summons as to Jones and three other defendants, by publication in the *California Chronicle*, at least once a week for a period of three months. The proof that the order was complied with was the following affidavit:

"STATE OF CALIFORNIA, }
"City and County of San Francisco. }

"H. F. W. Hoffman, principal clerk in the office of the *California Chronicle*, a daily newspaper published in said city and county, being duly sworn, deposes and says, that the notice of which the annexed printed notice is a copy, has been published in said paper at least once a week three months, commencing on the 26th day of September, 1857, and ending on the 26th day of December, 1857. H. F. W. HOFFMAN.

"Subscribed before me this 26th day of December, 1857.

"D. B. HEMPSTEAD, Notary Public."

By subdivision third of the thirty-third section of the Practice Act, the fact that an order of publication has been complied with, is to be proved by "the affidavit of the printer, or his foreman, or principal clerk;" and as we construe the provision, they are the only persons competent to testify on the subject. That the affiant is one of the three, is itself a substantive fact, and must be proved as such before the Court in which the action is pending can proceed to render judgment against the parties to whom notice is intended to be given. In the affidavit now in question, the affiant swears to nothing except to the matter set forth after the word "deposes." He names himself as principal clerk, but he does not swear that that was his position in fact. (*Ex parte Bank of Monroe*, 7

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Hill, 178; *Cunningham v. Goelet*, 4 Denio, 71; *Staples v. Fairchild*, 3 N. Y. 44; *Payne v. Young*, 8 N. Y. 158.) The result is, that as the record in *Steinbach v. Leese et al.*, is made up, judgment was rendered against Jones without any proof that the order of publication had been complied with. There are other grounds upon which it is insisted that the proceedings under the order were fatally defective, but it is not necessary for us to consider them.

The respondent, however, contends that Jones appeared to the action by giving a notice of appeal from the decree through an attorney, who, it appears, properly represented some of the defendants, but who, without authority and inadvertently, inserted Jones' name in the notice as one of the parties for whom he acted. It is provided by the five hundred and twenty-third section of the Practice Act, that "a defendant shall be deemed to appear in an action when he answers, demurs or gives the plaintiff a written notice of appearance for him." The words "answers" and "demurs" are obviously words of enumeration, and we cannot, on received principles, interpolate into the text, notices of motion for new trials, notices of appeal, nor any other paper served incidentally in the conduct of judicial proceedings, the direct and principal purpose of which is, not to give notice of appearance, but to give notice of a step taken or about to be taken in the cause. We have no doubt that the written notice of appearance provided for in the section, is a document to be drawn up especially for that purpose, and that service of it is to antedate, or to be contemporaneous with, the service of all other notices and papers.

Steinbach was himself the purchaser at the Sheriff's sale, and must be presumed to have bought with notice of all defects in the proceedings relating to the publication. (*McMillan and Wife v. Reynolds*, 11 Cal. 378.)

The order appealed from is reversed.

Points decided.

JAMES B. McMINN v. PATRICK WHELAN AND MOSES O'CONNOR.

PROOF OF EXECUTION OF INSTRUMENTS IN WRITING.—An instrument in writing, executed and attested by a subscribing witness in a foreign country, or at a place beyond the jurisdiction of the Court, can be proved by evidence of the handwriting of the party who executed it.

SERVICE OF SUMMONS BY PUBLICATION.—When an order is made for the service of summons by publication, and a summons is issued, and a supplemental complaint is afterwards filed and a summons issued thereon, the original action becomes merged in the action as supplemented, and the Court will not acquire jurisdiction of the persons of absent defendants by publication of the original summons; but the summons issued on the supplemental complaint must be served by publication.

HOW SUMMONS SHOULD BE PUBLISHED.—If service on a defendant is attempted to be procured by publication, the summons must be published as it was when the order of publication was made.

JUDGMENT WITHOUT JURISDICTION OF PERSON.—If it appear by the record or otherwise that the Court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it comes directly or collaterally in issue, and a sale of property under it will be void also.

JURISDICTION OF PERSON.—If jurisdiction of the person of defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued, and in such case there will be no presumption in favor of jurisdiction.

ACTION TO SET ASIDE CONVEYANCE OF LAND.—A lien on land acquired by an attachment, cannot be rendered effectual for the purpose of impeaching a conveyance of the land made by the defendant in the attachment, until judgment is obtained in the suit in which the attachment issued.

CREDITOR WITHOUT JUDGMENT.—A creditor at large, without a judgment, is not in a position to maintain an action to set aside a conveyance of property made by his debtor.

ASSIGNEE OF VOID JUDGMENT.—If the assignee of a void judgment, together with the cause of action on which it was rendered, offers the same in evidence, this does not prove that the assignee is a creditor of the defendant in the judgment.

DEED FOR LAND SOLD FOR TAXES AS EVIDENCE.—If the certificate of sale of property for taxes is made to "Michael Dundon," and the deed under the certificate is made to "Patrick Michael Dundon, Jr.," and it appears in proof that there were two persons, Michael and Patrick Michael, and there is no evidence that Patrick Michael acquired the right of Michael by assignment, the deed is not admissible in evidence without proof that the two names are for the same person.

CLAIMANT OF LAND CANNOT ACQUIRE TAX TITLE.—One who is in possession of land, claiming it as his, when it is assessed for taxes, cannot, by failing to pay the tax and allowing the land to be sold for the same, and becoming the purchaser, and obtaining a Sheriff's deed, acquire a title to it.

CONDUCT OF A JUDGE DURING A TRIAL.—If the character of a witness is called in question during a trial, and the Judge makes a remark from the bench indorsing his respectability, it is good cause for a reversal of judgment, if the testimony of the witness is material.

STATEMENTS AND EXCEPTIONS.—A statement on motion for new trial, or a

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bill of exceptions, should contain only so much of the evidence or a reference thereto as may be necessary to explain the grounds specifically set forth as causes for new trial. Judges or Courts, in settling statements, should see that the above rule is complied with.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Edward Tompkins, for Appellant.

The power of attorney from Maume to Dundon was not sufficiently proven, and its admission was error.

Whether secondary evidence as to the execution of the power of attorney should be received or not, was a preliminary question, to be legally and correctly decided by the Judge. Whether O'Farrell, the attesting witness, was absent from California; whether his signature could be proved in California; and whether due diligence had or had not been used by the plaintiff to ascertain these alleged facts, were matters to be decided by the Judge upon the testimony introduced upon those points. The plaintiff testified that in his search for O'Farrell, "he found nobody of the name of O'Farrell; and that he thought he looked into some of the Directories." If this was sufficient as *prima facie* proof, still it was not conclusive; and accordingly the defendant offered to rebut it by showing, "from the City Directory, that there were a number of persons in the city by the name of O'Farrell," which proof, if received, would have overturned the *prima facies* of the plaintiff's testimony, by showing that he did not consult the City Directory, the most obvious source of information, and so did not use due diligence in that regard. But the Judge treated the matter as if testimony were to be received on only one side, and no rebutting testimony to be admitted, which is insisted to be error.

Again: If it be held that the absence of the attesting witness was properly accounted for, this would not admit testimony as to the genuineness of the signature of the donor of

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the power, but only testimony as to the genuineness of the signature of the attesting witness. The rule is, that "the testimony of the subscribing witness, or proof of his handwriting *and of his absence should be given.*" (*Jones v. Underwood*, 28 Barb. 481; *Story v. Lovett*, 1 E. D. Smith, 153; 2 Abbott's N. Y. Digest, p. 709, Sec. 1,316; 2 Phillips' Ev. 4th Am. Ed. 460, 500, etc.) See a curious history of the origin of the rule, *Fox v. Reil*, 3 Johns. *478.

But in the case at bar, the plaintiff proved only the absence of the attesting witness, and then, after suggesting that such witness resided in Limerick, without endeavoring to prove his handwriting by any method, the plaintiff proceeded at once to prove the handwriting of the maker of the power of attorney.

The Court below erred in excluding the tax deed from Hunt, the Tax Collector, to Patrick Michael Dundon, and the exception thereto was well taken.

The ground of exclusion was, that the certificate of the tax sale was to Michael Dundon, whereas the deed was to Patrick Michael Dundon, Jr., and these were two different persons, and no connection shown between them by assignment. The law only knows one Christian name. (*Franklin v. Talmadge*, 5 Johns. 84; *Roosevelt v. Goodwin*, 2 Cowen, 463.) The law also disregards the word *Jr.*, or *junior*, as a part of a name. (*People v. Collins*, 7 Johns. 549; *Foot v. Youngs*, 11 Wend. 522.)

The Court below erred in its charge to the jury in regard to the tax deed to Ryan, under which the defendants claimed title, and the exception thereto was well taken.

The mere fact that a person is in possession of land as a trespasser, but claiming it as owner, will not prevent his acquiring title to it under a tax sale. There must be something more, throwing an obligation upon him, making it his duty to pay the taxes. The lands must be assessed to him; (*Moss v. Shear*, 25 Cal. 38;) *or*, he must have agreed with the owner to pay the taxes; *or*, finally, he must be a trespasser in possession, excluding the rightful owner, *and the annual*

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value of the land must be equal to the tax assessed. In these cases the law throws the obligation and duty of paying the taxes upon the person in possession, and he will not be permitted to make title against the real owner under a tax sale. (*Gaskins v. Blake*, 27 Miss. 675.)

[In the case of *McMinn v. O'Connor et al*, ante, 238, reference is made to a brief of Dwinelle, Shafter & Goold, in which they discussed the ruling of the Court in excluding the judgment-roll in the case of *Gleason v. Maume*. The brief was not published there because the Court in its opinion in that case leave the discussion of that point to the opinion in this case. The following are extracts from the brief—REPORTER]:

The record being that of a Court of general jurisdiction, having jurisdiction of the subject matter, it will be presumed that it acquired jurisdiction of the parties.

The reported cases in which Courts have avoided judgments rendered by Courts of general jurisdiction, upon a defective service of process, or without any service, have been generally cases where the judgment was attacked *directly* in the same Court by motion or on appeal, or by a bill in equity. If Courts upon such occasions have said that the judgment was *void*, that must be considered as an inaccurate mode of expressing the proposition that the judgment could not be sustained, unless the Court has expressly said that it is "absolutely void, and not merely voidable." (*Whitwell v. Barbier*, 7 Cal. 54; *Bell v. Thompson*, 19 Cal. 706.)

"On appeal a judgment by default will be reversed, unless the record show service on the defendant, though possibly a judgment so obtained could not be impeached collaterally." (*Schloss v. White*, 16 Cal. 65; *Per contra*, *Hart v. Seixas*, 21 Wend. 40.)

But, "There is a very decided distinction between the *want* of jurisdiction and *irregularity* in procuring jurisdiction. In the latter case some of the authorities speak of it as a want of jurisdiction, but when so employed it is a loose and im-

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proper use of the term. In the one case the judgment can be attacked in any form—that is, directly or collaterally; in the other, only by a direct proceeding against the judgment in the Court which rendered it, or in an appellate Court upon an appeal from the judgment.” (*Whitwell v. Barbier*, 7 Cal. 63, 64.)

The distinction is, that the jurisdiction of a Court of general jurisdiction need not be shown affirmatively, but will be presumed. (*Bloom v. Burdick*, 1 Hill, 140; *Borden v. The State*, 6 Eng. 519; *Hardy v. Gholson*, 26 Miss. 70; *Tallman v. Ely*, 6 Wis. 244.)

But even in the case of a Court of general jurisdiction, if the record affirmatively shows that it had not in fact acquired jurisdiction of the person of the defendant, that fact will be fatal to the judgment. (*Borden v. Fitch*, 15 John. 141; *Whitwell v. Barbier*, 7 Cal. 54, 63.)

In regard to inferior Courts nothing will be presumed, and if the party in interest is to be brought in by means of publication of notice, the want of such notice will be a fatal defect. (*Whitwell v. Barbier*, 7 Cal. 64; *Bloom v. Burdick*, 1 Hill, 140; *Mills v. Martin*, 19 Johns. 7; *People v. Huber*, 20 Cal. 83; 3 Phillips Ev. 4th Ed. 137, note 293.)

It is provided by 2 Revised Statutes of New York, page *319, § 13, (Sec. 12,) that in cases of partition of lands unknown owners may be served by publication. Section two hundred and sixty-nine of our Practice Act is taken from this provision, and does not differ from it in substance.

Held, *at first*, that a judgment made in partition under this statute was not valid, and could be impeached collaterally by unknown owners, if the record did not show on its face that they had been served by such publication. (*Denning v. Corwin*, 11 Wend. 648.)

But this doctrine was immediately overruled, and the Court held that such a judgment by a Court of general jurisdiction was not absolutely *void*, so as to be impeachable *collaterally*, but merely *irregular*. The true proposition is, that a judgment of a Court of record within the State, of general juris-

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diction, and proceeding according to the course of the common law, where a want of jurisdiction is not apparent on the face of the record, cannot be impeached by the parties to it so long as it remains unreversed. (*Granger v. Clark*, 9 Shep. 128; *Van Dyke v. Bartedo*, 3 Green, 224.)

But the want of averment of service of process, or a defective averment on that point, is not an affirmative showing of want of jurisdiction, but at the utmost suggest only error to be corrected directly on appeal. (*Smith v. Bradley*, 6 Smedes & Marshall, 485; *McIlrath v. Butler*, 7 Iredell, 398; *Bloom v. Burdick*, 1 Hill, 130; *Foot v. Stevens*, 17 Wend. 483; *Cole v. Hall*, 2 Hill, 625.)

If it be said that the record disclosed a defective service of an imperfect summons, the obvious reply is, that these are evidently not what the Court adjudged to be a regular service of regular process, and we refer to those cases cited in this argument where the process was clearly defective in substance or in the proof of service, and there can be no difference between the cases of good process without proof of its service, and of defective process with sufficient proof of service, as both cases are defective in not showing service of process. The presumption in favor of jurisdiction is not rebutted by an irregular process appearing in the record. After a lapse of time, conveyances, powers of attorney, fulfilment of conditions precedent, and the like acts, will be *presumed* in order to connect possession with title. (*Beall's Lessee v. Lynn*, 6 Har. & Johns. 361; *McConnell v. Bowdry's Heirs*, 4 Monroe, 395; *Buhols v. Boudousquie*, 8 Mart. Lou. [New S.] 221; *Clinton v. Campbell*, 10 Johns. 475.)

But under the same circumstances, on an attempt to connect possession with title, a defective and void deed was offered in evidence and rejected, and yet a good deed was presumed. (*Gitting's Lessee v. Holl*, 1 Har. & Johns. 14, 18.)

Even if a Court of general jurisdiction does not acquire jurisdiction of the parties, the judgment is not therefore void, but only irregular, and can be attacked only directly, and not collaterally.

Argument for Respondent.

It is only when a Court has no jurisdiction of the *subject matter* of the proceeding in which an order is made, that the order is wholly void for want of jurisdiction. (*Bingham v. Disbrow*, 14 Abbott, 251; *Cole v. Hall*, 2 Hill, 625; *Bloom v. Burdick*, 1 Hill, 141; *Foot v. Stevens*, 17 Wend. 483, 488; *Hart v. Seixas*, 21 Wend. 40; *Newham v. City of Cincinnati*, 18 Ohio, 323; *Lamprey v. Nudd*, 9 Foster, N. H. 299; *Grier v. McLendon*, 7 Geo. 362; *Reed v. Wright*, 2 Green, Iowa, 15; *Barry v. Greenfield*, Wright, 348.)

If the judgment is not void on its face it cannot be attacked collaterally. (*Hall v. Hiffly*, 6 Humph. 44; *Barron v. Yart*, 18 Ala. 668; *Hopkins v. Howard*, 12 Texas, 7; *Seely v. Reed*, 8 Iowa, 374.)

When it appears on the face of the record of a judgment of the Court of ordinary and proceedings, that the Court had jurisdiction over the subject matter, such judgment will be conclusive when offered in any other Court, and cannot be collaterally attacked. (*Grier v. McLendon*, 7 Geo. 362; *Mobley v. Mobley*, 9 Geo. 247; *Pease v. Whitten*, 31 Maine, 117.)

G. F. & W. H. Sharp, for Respondent.

It is established law, as to the judgments of all Courts, *when it appears from the record itself*, that summons was not served in one of the statutory modes, jurisdiction of the defendant is not acquired. Such statute being *stricti juris*, the most exact compliance with all the prerequisites of the statute must be shown. *No judgment* can be obtained without it. In the absence of one requirement, that purporting to be a judgment is *coram non judice* and void.

How could a Court pass beyond the limits of the very law that confers the authority? (Practice Act, Sec. 30; *Gossett v. Howard*, 10 Q. B. 452; *Bigelow v. Stearns*, 19 John. 39; *Harrington v. The People*, 6 Barb. 607; *Steen v. Steen*, 3 Cushman, 513; *Noyes v. Butler*, Id. 613; *Denning v. Corwin*, 11 Wend. 648; *The People v. Cassel*, 5 Hill, 164.)

Again, in acquiring jurisdiction by *publication*, there are no

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presumptions in favor of the record. It can be impeached or set aside collaterally. (See cases cited above.)

It is only in reference to matters *within their common law jurisdiction* that records of Courts of general jurisdiction cannot be attacked. As to new rights conferred by statute, they are *inferior Courts*.

"Whenever a new right (service of summons by publication) is created by statute, and its enforcement is committed to a Court of general jurisdiction, such Court quo ad hoc is an inferior Court, and must pursue the statute strictly." (*Cohen v. Barrett*, 5 Cal. 210; *Whitwell v. Barbier*, 7 Id. 321; *Reynolds v. Harris*, 14 Id. 678; *Denning v. Corwin*, 11 Wend. 647; *Sharp v. Spier*, 4 Hill, 76; *Williamson v. Berry*, 8 How. 495.)

That jurisdiction may always be inquired into in every action, by every Court, where the proceedings are relied upon by any one claiming a benefit thereunder. (*Whitwell v. Barbier*, 7 Cal. 62; *Gray v. Hawes*, 8 Id. 568; *Hampton v. McConnell*, 3 Wheat. 234; *Mills v. Duryea*, 7 Cranch, 481; *Chemung Canal Bk. v. Judson*, 8 N. Y. 254; *Dobson v. Pearce*, 12 N. Y. 156; and cases before cited.)

The respondent stands in the same if not a better position than Maume. We cannot conceive how appellants, having derived possession from Maume's tenant, could resist, by force of that record and sale, his (Maume's) claim to be restored to possession. In law they entered in subordination to but in fraud of Maume's right.

They must restore the possession before they could show, if they had such, a title adverse to Maume. They can show only that his title has expired, and has centered in them. This must be, however, a legal title; and if derived at a Sheriff's sale, it must be supported by a *valid* judgment. This is true of all titles derived under judicial sales. (*Johnson v. Scissam*, 8 John. 499; *Johnson v. Bard*, 4 Id. 230; *Johnson v. Dennison*, 4 Wend. 558; *McKune v. Montgomery*, 9 Cal. 576.)

Certainly Maume could attack this judgment, if invoked against him, in ejectment, to be restored to his possession. Respondent's position is superior to his, because he was *not a*

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party to the suit. Respondent could only attack it when used against him. He could neither prevent nor control the suit; hence, he cannot be affected by it. This is the first opportunity that is presented for so doing.

The charge of the Court in regard to the tax deed to Ryan was correct.

When this property was assessed and offered for sale, Ryan claimed it; hence, if valid in its preliminaries, the tax sale to him, and payment by him, would only amount to the payment of the tax, (*for the tax ran against him as a claimant,*) and would not result in passing the title. (*Kelsey v. Abbott*, 13 Cal. 619.)

By the Court, CURREY, J.

This is an action of ejectment commenced on the twenty-third of September, 1863, for the recovery of a lot of land on the corner of Folsom and Tenth streets, in San Francisco, and for damages for withholding it from plaintiff. By the answers, the defendants denied the material averments of the complaint, and then pleaded the Statute of Limitations, and also an equitable defense on which they prayed affirmative relief. The cause was tried by a jury, without first disposing of the equitable defense, and a verdict was rendered in favor of plaintiff for the recovery of the possession of the premises, and one hundred and eighty dollars damages. On this verdict judgment was entered. The defendants moved for a new trial, which was denied.

Much evidence was given at the trial respecting the possession of the premises by Mathew Maume and his tenants existing in the year 1854, and thence continuing to the time of the defendants' entry thereon, which was in 1861. That Maume had the prior possession of the premises was determined by the jury in the affirmative, and as there was evidence authorizing the verdict in this respect, no just complaint can be made, because it was not more ample.

The plaintiff claimed title to the premises by a deed of con-

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veyance produced in evidence, bearing date the tenth of May, 1861, purporting to have been executed by Mathew Maume, by his attorney in fact, Michael Dundon.

To prove that Dundon had authority as attorney for Maume to execute in his name the deed of conveyance to the plaintiff, the plaintiff offered in evidence an instrument in writing under seal, purporting to be a power of attorney executed on the thirty-first of January, 1859, by Mathew Maume, then a resident of Limerick, in the United Kingdom of Great Britain and Ireland, to Michael Dundon, of Brookville, in the County of Clare, Ireland, appointing and constituting the said Dundon the attorney for the said Maume, and granting to him power to sell and convey, for and in the name of the constituent, the premises in controversy. This power of attorney appears upon its face to have been executed in the presence of one Thomas O'Farrell, and when it was offered in evidence it was objected to by defendants on the ground that it was not proved to have been executed by Mathew Maume. The plaintiff then introduced evidence to the Court for the purpose of laying a foundation for the introduction of secondary evidence of the execution of the instrument by Maume. The plaintiff himself was sworn and examined respecting the efforts he had made, preparatory for the trial, to discover the attesting witness, if within the jurisdiction of the Court. His testimony showed that he had exercised great diligence for the purpose of finding the witness, and also to discover some one by whom his handwriting could be proved. After this evidence was admitted, the plaintiff proved the handwriting of Mathew Maume by a person who knew it, and then submitted the power of attorney to the Court for inspection, and at the same time offered it in evidence as proved. The defendants objected that the absence of the subscribing witness was not sufficiently accounted for, and also that his handwriting was not proved; and accompanying this objection they proposed to prove by exhibiting the City Directory that a number of persons were residing in San Francisco by the name of O'Farrell, and insisted that they were the proper persons of whom to inquire

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for the witness. The Court overruled the objections and the instrument was read in evidence to the jury. To this ruling the defendants excepted.

In the case of *McMinn v. O'Connor and Others*, ante, 238, we have declared, on the authority of *Landers and Wife* against *Bolton*, 26 Cal. 409, and the authorities cited in that case, that an instrument in writing, executed and attested by a subscribing witness in a foreign country or at a place beyond the jurisdiction of the Court, could be proved by producing evidence of the handwriting of the party who executed it. The presumption in the case is, that the attesting witness, who was in Ireland when he signed the document as a subscribing witness, remained there, and consequently was beyond the jurisdiction of the Court at the time of the trial. (*Valentine v. Piper*, 22 Pick. 89, 90.)

The defendants, for the purpose of showing that the title of Mathew Maume had passed to one of them, offered and gave in evidence a judgment obtained by Timothy Gleason against Mathew Maume on the twenty-seventh of October, 1860, and also the judgment roll and the proceedings in the case. The plaintiff objected to the evidence offered controverting the validity of the judgment, and maintaining that it was *coram non judice* and void.

On the second of November, 1859, Gleason commenced an action by filing a complaint in the District Court of the Twelfth Judicial District against Mathew Maume, Samuel Adamson and Mary E. Maume, the object of which was to recover from Mathew Maume seven thousand dollars, alleged to be due from him on a contract set forth in the complaint, and to obtain a decree against the defendants Adamson and Mary E. Maume, setting aside as fraudulent certain mortgages on real property, executed and delivered to them by Mathew Maume, and a decree against Mathew Maume, compelling him to execute a mortgage on the same real property as security for the payment of the debt sought to be recovered, in pursuance of an alleged agreement that he would so secure the same. A summons was issued on the day the complaint was filed, and on

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the same day the attorney for the plaintiff therein made an affidavit that the defendants were absent from the State, two of them residing in Ireland and the other in England. Whereupon the Court made an order that the service of the summons be made by publication in a certain newspaper specified in the order, for at least once a week for three months. On the fifth of December, 1859, the plaintiff Gleason filed a supplemental complaint in the action against the same persons and also against Michael Dundon, Michael Maume and Johanna Maume as defendants. This supplemental complaint embodied, by direct averments and reference, the same matters contained in the original complaint, and further alleged and charged that Mathew Maume, with intent to cheat and defraud the plaintiff Gleason out of the debt due him, entered into an agreement with Michael Dundon, in Ireland, to come to California for the purpose of covering up, concealing and disposing of his property so as to cheat and defraud the plaintiff and other of his creditors out of their debts; and fraudulently agreed with Dundon to convey to him certain real property in the City of San Francisco, for the fraudulent purpose of cheating and defrauding his creditors.

The supplemental complaint is replete with charges of acts of the defendants by which they designed to defraud and had defrauded the creditors of Mathew Maume, and that the defendant Dundon had thus acquired title to a portion of his property, and others of the defendants had obtained from him mortgages on other portions of his property, all of which transactions were fictitious, and intended to cheat and defraud the creditors of Mathew Maume. In conclusion, the plaintiff Gleason, in addition to the relief which he sought in his original complaint, prayed that the conveyance from Mathew Maume to Dundon might be declared fraudulent and void, and that the same might be decreed to be delivered up to be cancelled.

By the supplemental complaint it was sought to obtain an accounting by Johanna Maume and Michael Maume for the income and profits of the property of Mathew Maume while

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in their possession and use. A summons was issued on this supplemental complaint on the day it was filed. On the tenth of the same month the Court made an order, on an affidavit of the plaintiff's attorney therein, that the service of the summons be made on the three absent defendants by publication thereof in a specified newspaper for at least once a week for three months.

The proof of the publication of summons in the Gleason case was by the affidavit of "the bookkeeper in the office of the printer and publisher of the *Daily Morning Call* newspaper," made on the second day of May, 1860. This affidavit states "that a notice, of which the annexed is a printed copy, has been regularly published in the said newspaper at least once a week for three months, commencing on the 8th day of November, 1859, and ending on the 24th day of April, 1860." The "notice" mentioned in the affidavit purported to be a summons, issued on the second of November, 1859, in the case of *Timothy Gleason*, plaintiff, against *Mathew Maume et al.*, defendants, and directed to the defendants named in the original complaint. It differed from the summons actually issued, showing that it had been altered. Instead of its simply requiring the defendants to answer "the complaint filed," it required them to answer "the complaint (original and supplemental) filed." In the statement of the cause and general nature of the action the summons first issued set forth, among other things, that the action was brought "to set aside certain conveyances made by said Mathew Maume to the defendants, Samuel Adamson and Mary E. Maume, alleged to be fraudulent and void," while the summons as published contained the same notice, with the name of Michael Dundon interpolated after the name of Mary E. Maume as one of the defendants. At the time of the filing of the supplemental complaint making Dundon, Michael Maume and Johanna Maume parties defendants, there had been four publications of the "notice" or summons mentioned in the affidavit of the bookkeeper according to such affidavit. While we do not intend to impugn the integrity of the bookkeeper, the convic-

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tion is forced upon us that some one concerned was guilty of tampering with the record by interpolating matter in the summons that was not therein when it was issued, and when the order for its service by publication was made.

By filing the supplemental complaint and issuing a summons thereon, the original action became merged in the action as supplemented by the addition of parties and subject matter, and the summons last issued should have been served by publication in order to clothe the Court with jurisdiction of the persons of the absent defendants. The publication of the original summons, even if it had been made, would have been ineffectual to give the Court jurisdiction of the persons of the absent defendants, because the original complaint had been superseded by the supplemental complaint. Mathew Maume had the right to appear and be heard as to the additional matters charged as well as in respect to the matters contained in the original complaint which had been carried into the supplemental complaint. (*Lawrence v. Bolton*, 3 Paige, 295; *Scudder v. Vorhis*, 1 Barb. 55.)

The defendant's counsel insist that the judgment in the Gleason case cannot be questioned collaterally, for the reason that the jurisdiction of a Court of general or superior jurisdiction will be presumed in the absence of evidence on the face of the record to the contrary. The case of *Peacock v. Bell*, 1 Saund. 73, is generally relied on in support of this doctrine. In that case it was declared that "the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court, but that which is so expressly alleged." The case here cited involved the question of jurisdiction as to the subject matter of the action, and not as to the person of the defendant, and it may be doubted if a case can be found which sanctions any interment of jurisdiction over the person of the defendant, when the same is to be acquired by a special statutory mode, without personal service of process. If jurisdiction of the person

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of the defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued. (*People v. Huber*, 20 Cal. 81; *Ricketson v. Richardson*, 26 Cal. 149; *Kendall v. Washburn*, 14 How. Pr. R. 380.)

It is a cardinal principle in the administration of justice that no man can be condemned or divested of his right until he has had an opportunity to be heard. Though the rule in relation to Courts of general or superior jurisdiction is, that their jurisdiction will be presumed until the contrary appears, it may be doubted whether the rule obtains when the course prescribed for acquiring jurisdiction of the person of the defendant is contrary to the course of the common law. (*Oakley v. Aspinwall*, 4 Coms. 521 and 525.) Be this as it may, if it appear by the record or otherwise that the Court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it comes directly or collaterally in question; and this is so whether the Court be of inferior or superior jurisdiction.

The judgment in the Gleason case contains no averment nor recital from which it can be inferred that the Court acquired jurisdiction of the person of the defendant Mathew Maume. If it did it would not be conclusive of the assumed jurisdiction in such a case. It is a fundamental rule that no Court can acquire jurisdiction by the mere assertion of it, or by deciding that it has it. If it could be intended in the absence of evidence to the contrary that such jurisdiction was acquired, such intendment is overcome by the evidence furnished by the defendants themselves, consisting of the affidavit of the bookkeeper of the newspaper publisher and the notice or summons annexed to that affidavit.

Neither the summons issued on the original complaint nor that issued on the supplemental complaint was published. The interpolation noticed so changed the summons pretended to have been published as to destroy it as evidence of service of process by publication, and hence we must hold that no publication of any summons issued in the case was made.

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Other objections were made touching the sufficiency of the respective affidavits on which the orders of publication were made concerning which we shall express no opinion, as we deem the point of objection considered fatal to the Gleason judgment; the result of which is that such judgment, for want of jurisdiction in the Court that rendered it, over the person of Mathew Maume, must be held void, and as a consequence, the execution thereon and the sale of the property under and by virtue of it must be held void also.

But it is insisted on the part of the defendants that the attachment which was issued and levied upon the property in question and which with all rights acquired thereby, had been assigned to the defendant O'Connor, constituted a lien upon the property, which continues notwithstanding the judgment obtained by Gleason against Maume may be void, and that O'Connor, having such lien, had an interest in the premises which entitled him to impeach the conveyance to the plaintiff on the ground of fraud. If the defendant O'Connor had a lien on the premises by reason of the attachment, that lien could not be rendered effectual for the purpose of impeaching the conveyance to the plaintiff until judgment obtained in the suit of *Gleason* against *Maume*, and it is possible that no such judgment will ever be obtained. If the defendant O'Connor, as the assignee of Gleason, was at the commencement of this action, and when it was tried, the creditor of Mathew Maume, he was simply a creditor at large without a judgment, and hence was not in a position to maintain an action by answer in the nature of a cross bill in equity to set aside the conveyance made to the plaintiff. (*Crippen v. Hudson*, 3 Kern. 161; *Reubens v. Joel*, 2 Kern. 488; *Bishop v. Halsey*, 3 Abbott, 400; *Wilson v. Forsyth*, 24 Barb. 117.)

Even if it had been competent for the defendants, in the capacity of creditors at large of Mathew Maume, to have impeached in this action the conveyance to the plaintiff as fraudulent, they failed to establish the fact that they were creditors, or that either of them was a creditor, of plaintiff's grantor. The void judgment of Gleason, with the assignment

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of it, together with the alleged cause of action on which it purported to be founded, did not prove O'Connor to be a creditor of Maume, and no other evidence was offered to prove him such. The attachment and proceeding therewith connected given in evidence by the defendants, but finally excluded by the Court on the plaintiff's motion, were, as the case then stood, incompetent for the purpose for which they seem to have been produced in evidence, and were properly excluded.

The defendants gave in evidence a judgment recovered in May, 1861, by Bernard Rooney against Mathew Maume, foreclosing a mortgage on other property in San Francisco than that in controversy, and in connection with it, showed that after the sale of the mortgaged premises there remained due the sum of about ninety dollars. The object of this evidence was declared by the counsel for the defendants on the trial to be merely to show that the Rooney judgment was not satisfied.

But it was subsequently attempted to be shown that the balance due had passed by assignment to the defendant O'Connor. It was sought to be proved that Rooney had made an assignment of the balance due on his judgment through the agency of an attorney in fact, and the defendants having failed to establish this fact to the satisfaction of the Court, the document purporting to be Rooney's assignment was excluded on the plaintiff's objection. The testimony offered to prove the authority of the person who pretended to act as the attorney in fact for Rooney we regard as very unsatisfactory, and we are of opinion the document was properly excluded.

The defendants failed to show that they, or either of them, were creditors of Mathew Maume, and consequently, were not in a position to impeach the conveyance of the premises to the plaintiff as fraudulent and void as to Maume's creditors. (*McElwain v. Yardley*, 9 Wend. 548; *Crippen v. Hudson*, 3 Kern. 161; *Reubens v. Joel*, 3 Kern. 488; *Bishop v. Halsey*, 3 Abbott, 400; *Wilson v. Forsyth*, 24 Barb. 105.) As between the grantor and grantee, a conveyance executed to defraud creditors is valid. (*Bolt v. Rogers*, 3 Paige, 154; *Gale v.*

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Gale, 19 Barb. 249; *Chamberlin v. Barnes*, 26 Barb. 160; *Gardenier v. Tubbs*, 21 Wend. 169; 1 Story's Eq. Jur., Sec. 371.)

In addition to the equitable defense interposed by the defendants, they offered evidence to show that the defendant O'Connor had acquired title to a portion of the property by virtue of a sale and conveyance of it for the payment of taxes. Two tax deeds were given in evidence, the one bearing date on the sixteenth of July, 1860, executed by the Tax Collector to Patrick Michael Dundon, Jr., the other bearing date the nineteenth of July, 1862, executed by the Tax Collector to R. F. Ryan.

The first tax deed was objected to by plaintiff on several grounds. The certificate of sale, which was produced in evidence by the defendants, showed that the premises described in it and in the deed, were sold to Michael Dundon, whereas the deed was made to Patrick Michael Dundon, Jr., and there was no evidence showing that the grantee named in the deed had acquired the right of Michael Dundon by assignment or otherwise. But it is insisted on the part of defendants that Patrick Michael Dundon, Jr., is presumptively the same person as Michael Dundon. This position, in view of the authorities cited to support it, might appear in some degree plausible had it not been proved on the trial that there were two persons by the name of Dundon, one of whom was called Michael, and the other Patrick Michael.

Other objections were made to this deed, which need not be noticed, as this alone was sufficient to warrant its exclusion.

The tax deed to R. F. Ryan was objected to by plaintiff on the ground that no preliminary evidence was produced laying a foundation for its introduction; and, also, that the deed was void on its face because of the uncertainty of the description of the property as assessed and advertised, and also on the ground that at the time of levying the taxes and the sale of the land Ryan was a claimant of the property, and for that reason could not acquire title to it by paying the taxes by purchase at the tax sale. The Court, notwithstanding these

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objections admitted this deed in evidence, and the plaintiff attempted to impeach its validity by showing that a portion of the taxes for which the property was sold were not levied by law nor by any person or body under authority of law.

The assessment of the lot appears by the deed to have been made to "P. M. Dundon and to all owners and claimants known or unknown and to all owners and claimants of any interest present or future therein, or any lien upon the same."

The third section of the Revenue Act of 1857, as amended by the Act of 1859 (Laws 1859, p. 344,) requires the Assessor to assess all real estate to the person, firm, corporation, association or company owning it, or having the possession, charge or control of it, if known to him; and it is provided further that the property shall be assessed to the owner or claimant, if he shall be known to the Assessor, "and to all owners and claimants, known or unknown, and to all owners and claimants of any interest, present or future therein, or any lien upon the same, and no error in regard to such owner or claimant shall in anywise affect the validity of such assessment."

When this assessment was made the property did not belong to P. M. Dundon, though it may be he claimed some interest in it; but it was also assessed to "all owners and claimants, known or unknown, and to all owners and claimants of any interest, present or future, therein, or any lien upon the same," and the law declares, as already seen, that no error in regard to such owner or claimant shall in anywise affect the validity of the assessment so made. At the time of the assessment Ryan was in possession of the lot, claiming it, or some interest in it, and by the terms of the assessment it was assessed to him as a claimant, known or unknown, and when he paid the taxes properly levied, he only discharged his own obligation under the law. (*Kelsey v. Abbott*, 13 Cal. 609; *Moss v. Shear*, 25 Cal. 38.) On this point the learned Judge of the Court below charged the jury as follows:

"If the jury believe from the evidence that at the time the property was assessed and offered for sale Ryan claimed it and was in its possession, the tax sale to him and payment by him

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would only amount to the payment of the tax which it was his duty to have paid. In such case the sale thereof would not result in passing the title. In other words, he who is on land claiming it to be his is not at liberty to obtain a title by omitting to perform his duty to the State by paying the taxes as they accrue—that such claimant and possessor is not permitted under the law to be delinquent in his duty, and then seek by proof of such delinquency to obtain a title from the State to the land he so occupies.”

We are of opinion that this charge to the jury is sound in principle and should be maintained as the law of the land.

Johanna Maume was examined as a witness on behalf of plaintiff to prove Mathew Maume's prior possession of the demanded premises. On her cross examination inquiries were made of her respecting her residence and business. The plaintiff's counsel objected to this course of examination. The objection was overruled, but at the same time his honor the Judge stated that the witness was one of the most respectable women in his neighborhood. To this remark the defendants' counsel excepted, when the Judge further stated that he did not mean to say that she was one of the most respectable, but a woman of respectability. The defendants complain of the conduct of the Judge in this particular as an irregularity of sufficient magnitude to authorize the reversal of the judgment.

From the high and authoritative position of a Judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may on the one hand support the character or testimony of a witness, or on the other may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other. We regret the necessity for an expression of our disapproval of the irregularity of which complaint is made, and though we

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do not impugn the expression as designed to aid the side of the plaintiff, we may say, we should not hesitate to reverse the judgment because of it, if the same depended in any material degree upon the testimony of the witness whose character and standing was thus indorsed; but as it is, the testimony of Johanna Maume may be obliterated, and then the fact sought to be proved by her is established by the testimony of several other witnesses of the plaintiff, without any attempt on the part of the defendants to disprove it; besides which, such fact was virtually conceded by the defendants, whose claim to the possession of the premises, as the successors in interest of Mathew Maume, involved them in an admission of his prior right.

There are many other assignments of error in the record, all of which we deem untenable. We cannot give our reasons in this place for our conclusions respecting them, as to do so would be to extend this opinion to a burdensome length.

The transcript of the record and the proceedings in the Court below, seems to have been made up in palpable disregard in one respect of the law on the subject. The appeal is from the judgment and the order denying a new trial. The statute provides that a statement on which a party intends to rely for a new trial shall contain so much of the evidence or reference thereto as may be necessary to explain the grounds specifically set forth therein as causes for a new trial, and no more. (Practice Act, Sec. 195.) A similar provision respecting bills of exception, is contained in section one hundred and ninety of the same Act; and section two hundred and thirty-eight provides that when the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall prepare such statement, which shall state specifically the particular errors or grounds on which he intends to rely on the appeal, and shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more.

Instead of the statement in this case conforming to these provisions of the statute, or with any one of them, the Dis-

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strict Court Reporter's minutes of the testimony is embodied in gross, with every remark made by the Court or counsel, whether important or otherwise, during the progress of the trial; and besides this, long documents are set out in full, when a brief abstract in respect to most of them would have served as useful a purpose as the documents at length, and would have been much more convenient as well as more economical of time and money. The judgment rolls in the Gleason and Rooney cases are set forth in full, covering over sixty printed pages, when everything in them material for the purpose of the motion for a new trial, or on appeal, might have been embodied in an abstract of one sixth their length. The labor of examining and mastering the contents of a record thus made up, in order to discover what is material, is greatly enhanced beyond what it would be, were the provisions of the statute referred to observed.

[We are aware that it is not unfrequently the case where statements and bills of exception are prepared according to the letter and spirit of the statute, attorneys for respondents insist, by way of amendments, that all the evidence given and all that transpired at the trial shall be set forth in the statement or bill of exceptions, and the Judge who may have tried the cause is asked, not in vain, generally to order the statement to be so amended and engrossed. This course of conduct is sometimes adopted on the part of respondents to embarrass and oppress appellants. Such conduct and such a practice should be discountenanced not only by Courts having power in the premises, but also by all honorable men engaged in the practice of the law. While it is the duty of Courts, in settling statements, to see that so much of the evidence as may be necessary to explain the grounds assigned as error is stated fully and fairly, we may suggest that a great reform might be effected by exacting a compliance with the law on the subject.] (See also Laws 1864, p. 246.)

We have thus noticed the character of the transcript in this case, which is only one of many of the same kind, for the purpose of calling the attention of those who may have cases

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to prepare for this Court, to the provisions of the statute prescribing the mode of procedure in the preparation and settlement of statements and bills of exceptions, with the hope that a general reformation in practice in this particular may be effected.

Judgment affirmed.

CHRISTIAN J. MEGERLE v. RICHARD P. ASHE,
THOMAS VAN SYCKLE, AND LUTHER FLANDERS.

LEGISLATIVE GRANT OF LAND.—A legislative grant is as effectual to pass title to lands owned by the Government as a grant evidenced by a patent.

PATENT AS EVIDENCE OF TITLE.—A patent is not conclusive, as evidence of title as against a grant made by the legislative department, prior to the patent.

GRANT OF LAND TO STATES BY ACT OF SEPTEMBER 3d, 1841.—The Act of Congress of September 3d, 1841, is a present grant to each new State, upon its admission into the Union, of five hundred thousand acres of land; but the grant does not attach to any particular parcel of land until the State, through its agents, has selected the same, and the selection has been approved by the United States.

CONFLICT BETWEEN STATE PATENT AND UNITED STATES PATENT.—When a State has selected any tract of land as a part of the five hundred thousand acres granted by the Act of Congress of September 3d, 1841, and that selection has been made of public lands subject to the grant, and the selection has been approved by the United States, then the State or its grantee holds the title to the tract selected by a title superior to that asserted by the holder of a subsequent patent issued by the United States.

CONFLICTING PATENTS AS EVIDENCE.—If a plaintiff in ejectment offers in evidence a patent of the United States and rests, the defendant is entitled to offer in evidence a State patent of prior date for the same land, accompanied with proof that the land was selected by the State as part of the five hundred thousand acres granted to the State, and that the United States approved of the selection.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The defendants, Van Syckle and Flanders, were in possession of the land as tenants of defendant Ashe, who claimed to own it and defended on behalf of his tenants.

The following is the patent from the State to Terry:

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UNITED STATES OF AMERICA. }

State of California. }

To all to whom these presents shall come, Greeting:

WHEREAS, under the provisions of Act of the Congress of the United States, entitled "An Act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights," approved September fourth; one thousand eight hundred and forty-one, five hundred thousand acres of the public lands were granted to the State of California; and whereas, the Legislature of the State of California provided for the selection and location of said five hundred thousand acres of land, under and in pursuance of said Act of Congress, by the following Acts of the Legislature of said State, to wit: an Act entitled "An Act to provide for the disposal of the five hundred thousand acres of land granted to this State by Act of Congress, that the people of the State of California may avail themselves of the benefits of the eighth section of the Act of Congress, approved fourth April, eighteen hundred and forty-one, chapter sixteen, entitled 'An Act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights,' the following provisions are hereby enacted," approved May 3d, 1852. Also an Act entitled "An Act authorizing the location and patenting of school lands," approved April 30th, 1857. Also an Act entitled "An Act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to this State for School purposes, and the seventy-two sections donated to this State for the use of a Seminary of Learning," approved April 23d, 1858. And whereas, the Legislature of the State of California passed an Act entitled "An Act to provide for the issuance of patents to lands located with State School land warrants, and for lands purchased under the Act of April twenty-third, one thousand eight hundred and fifty-eight," approved April 16th, 1859. And whereas, it appears by the certificate of the Register of the State Land Office, No. 79, issued in accordance with the provisions of said last named Act, bearing date the sixth day of January, 1862, that the tracts of land here-

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inafter described have been duly and properly located in accordance with the provisions of the said laws of this State, and that David S. Terry is entitled to receive a patent therefor;

Now, therefore, the State of California hereby grants to the said David S. Terry, and to his heirs and assigns forever, the said tracts of lands located as aforesaid, and which are known and described as follows, to wit: The north half and the southwest quarter of section twenty-one (21), township four (4) north, range eight (8) east of Mount Diablo Meridian, containing four hundred and eighty acres, taken in lieu of four hundred and eighty acres, together with all the privileges and appurtenances thereunto appertaining and belonging.

To have and to hold the aforegranted premises to the said David S. Terry, and to his heirs and assigns, to his and their use and behoof forever.

In testimony whereof, I, John G. Downey, Governor of the State of California, have caused these letters to be made patent, and the seal of the State of California to be hereunto affixed. Given under my hand at the City of Sacramento, the eighth day of January, in the year of our Lord, A. D. one thousand eight hundred and sixty-two.

JOHN G. DOWNEY, Governor of State.

Attest:

[L. s.] JOHNSON PRICE, Secretary of State.

Countersigned:

[L. s.] H. A. HIGLEY, Register of State Land Office.

Indorsed—Letters Patent from the State of California, issued January 8th, 1862, to David S. Terry for 480 acres of State school land lying in San Joaquin County.

Plaintiff's patent from the United States did not recite nor purport to be founded upon a pre-emption, but upon a location of a bounty land warrant issued under the Act of Congress of March 3d, 1855, nor did the patent state when the land was surveyed, or at what time the warrant was located.

Plaintiff recovered judgment in the Court below and defendants appealed.

Argument for Respondent.

The other facts are stated in the opinion of the Court.

Patterson, Wallace & Stow, for Appellants.

Defendants offered to prove the recitals in the State patent.

The presumption is that the State officers had complied with the law.

If the law of the State was complied with, the land was vacant and unoccupied at the time of the State location, and was surveyed, etc.; and in that condition the State had a right to select and locate it—as part of the five hundred thousand acres. (See *Doll v. Meador*, 16 Cal. 316.) And when she made such selection with the consent of the United States Register and Recorder, to perfect the State title, all that remained was a ministerial act to be performed by the officers of the United States, viz.: the issuance of a patent. The selection by the State could not be overridden by the patent issued to plaintiff at a subsequent date. A patent could not be issued by the United States until the State had made a selection and location. Having made a selection, the United States could not defeat it by issuing a patent to *another* whose selection and purchase were subsequent.

Tyler & Cobb, for Respondent.

We maintain two propositions:

First—That a United States patent is *conclusive evidence* of legal title in the patentee, *in an action at law*, as against *everything* except a *prior patent* from the *same source of title*.

Second—That a patent of the United States cannot be attacked, except for fraud or mistake, and for these *only* in the United States Courts.

In support of the first proposition we cite the Court to the following authorities: *Bagwell v. Broderick*, 13 Pet. 436; *Finley v. Williams*, 9 Cranch, 164; *Hoofnagle v. Anderson*, 7 Wheat. 212; *Brush v. Ware et als.* 15 Pet. 93. A patent of the United States carries on its face the presumption that all the previous requisites of the law have been complied with.

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(*Polk's Lessee v. Wendal*, 9 Cranch, 87.) And this presumption is *conclusive* in an action at law. (*Bagwell v. Broderick*, 13 Pet. 436.)

In support of the last proposition we cite the cases of *Bagwell v. Broderick*, 13 Pet. 436; *Waterman v. Smith*, 13 Cal. 419; *Moore v. Wilkinson*, 13 Cal. 487; *Yount v. Howell*, 14 Cal. 165; *Stark v. Barrett*, 15 Cal. 366.

By the Court, RHODES, J.

The plaintiff claims title to the premises in controversy through a patent issued to him by the United States, September 1, 1863; and the defendants claim title under a patent issued by the State of California, January 8, 1862, to Terry, the grantor of Ashe. The plaintiff having introduced his patent rested, and the defendants then offered in evidence the patent from the State to Terry, and in connection therewith offered to prove by independent evidence that the statement and recitals in the patent were true, which were in substance that the land had been properly selected and located by the State, as a part of the five hundred thousand acres of land granted to the State, by the Act of Congress of September 3, 1841, and that Terry was entitled to receive a patent from the State for the lands described in the patent. The premises described in the two patents were identical. The Court excluded the patent and the evidence offered in connection with it, and the defendants excepted.

In support of the ruling of the Court the plaintiff advances two propositions: "First, that a United States patent is conclusive evidence of legal title in the patentee in an action at law as against everything except a prior patent from the same source of title; and second, that a patent of the United States cannot be attacked except for fraud or mistake, and for those only in the United States Courts." If the first proposition cannot be maintained the consideration of the second will be unnecessary, for if the patent is not absolutely conclusive it will be deemed to have been issued without authority of law—

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through fraud or mistake — as against a title that passed from the same source of title prior to the date of the patent. The first proposition assumes that, the title of the United States can pass only by a patent, for the learned counsel would not contend that the patent would be conclusive as against a prior title derived from the United States simply because the title did not issue in the form of a patent. This assumption stands opposed to a long series of decisions of the Supreme Court of the United States, as well as that of several of the States. In *Rutherford v. Greene's Heirs*, 2 Wheat. 196, in which the title of General Greene to the twenty-five thousand acres granted to him by the Act of the Legislature of North Carolina, was in issue, it being objected that the grant was not complete, because not attested by an instrument having the seal of the State attached. Mr. Chief Justice Marshall, in delivering the opinion of the Court, said that "the Court would certainly have thought it unnecessary to advert to it (the objection) had not the argument been urged repeatedly, and with much earnestness, by counsel of the highest respectability." A legislative grant is as effectual to pass the title to lands, in all respects and for every purpose, as a grant evidenced by a patent. (*Lessieur v. Price*, 12 How. 59; *Kernan v. Griffith*, ante, p. 88; *Summers v. Dickinson*, 9 Cal. 554; *Owen v. Jackson*, 9 Cal. 322.) The patent, therefore, being of no higher grade, as evidence of title, than a legislative grant, is not conclusive as against a person claiming under a grant made by the legislative department prior to the adverse patent. It may be remarked, also, that the Act of Congress makes no provision for the issuing of a patent to the State or her grantees, and if one should be issued it would amount to no more than a further assurance.

For the purpose of determining the question of the admissibility of the evidence offered by the defendants, it is necessary to ascertain in what manner the title to any particular tract of land passes to the State or her grantee, under the Act of Congress of September 3, 1841, for if the evidence tended to show that the title to the tract in controversy passed to the

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State or her grantee, prior to the date of the plaintiff's patent, the Court erred in excluding the evidence.

The eighth section provides that "there shall be and hereby is granted to each new State that shall be hereafter admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such State before its admission and while under a Territorial Government, for purposes of internal improvements, as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid." The language "hereby is granted" as has uniformly been held by the Courts, imports a present grant. The title to the amount of land specified in the Act passes upon the admission of the new State, though "wanting identity to make it perfect"—to attach it to a particular parcel of land. (*Lessieur v. Price*, 12 How. 59; *Rutherford v. Greene's Heirs*, 2 Wheat. 196; *Terry v. Megerle*, 24 Cal. 609.) The Legislature of a State must thereafter provide by law for the performance by her officers or agents, of the acts that may be requisite to indicate a selection of the tracts of land which, in the aggregate, will constitute the amount of land granted to the State by the Act of Congress. When a particular parcel of land has been "selected and located" in accordance with the provisions of the Act of Congress—when the selection and location have been made by the proper officers or agents, acting on behalf of the State, in such manner as the Legislature has directed, and on public lands that at the time are subject to such location, and the selection and location have been approved by the proper authorities of the United States, then the identification of the land has made the title perfect and attached it to the particular tract selected. The title, thus perfected and attached to the land, vests in the State, or her grantee, and all the interest the United States had in the particular parcel is held by the State or her grantee, by a title superior to that asserted by the holder of a subsequent patent issued by the General Government.

A person claiming title under the Act of Congress, through the State, would be obliged to show, as against one claiming

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under the United States through a patent issued in accordance with the general regulations for the sale of public lands, the performance of the acts required by law to constitute the selection and location of the land. This the defendant was proceeding to do when objection was made by the plaintiff. We do not undertake to say that the evidence offered by him would have been sufficient to have sustained his claim of title and upheld his patent from the State; but the offer to show that the recital was true, that the land had been "duly and properly located in accordance with the provisions of the said laws of this State," though general in its terms, certainly included several of the steps necessary to be taken in making the selection and location of the land. The refusal of evidence of the character offered would subject every title to portions of the five hundred thousand acres of land derived from the State to the liability of being defeated by subsequent patents issued by the United States.

The patent from the State was also admissible in connection with proof of the due selection and location of the land. We therefore hold that the decision of the Court in excluding the evidence offered by the defendants was erroneous.

Judgment reversed and the cause remanded for a new trial.

ELIZABETH DE UPREY v. SAMUEL DE UPREY, AND
MARY ANN DE UPREY.

COMPLAINT IN PARTITION.—In a complaint to obtain partition of land, a general allegation that "the premises cannot be divided by metes and bounds without prejudice," is sufficient, without an allegation of the facts upon which the plaintiff relies, to obtain a particular mode of partition.

SAME.—A complaint in partition is good which is silent upon the subject of the mode of partition.

PARTIES TO SUIT FOR PARTITION.—A married woman whose husband is sued in partition is a necessary party if she claims a homestead right to or an interest in the property in dispute.

DISCLAIMER IN PARTITION.—In an action of partition, a defendant cannot claim that the action be dismissed as to him, on the ground that his answer disclaims any interest in the land, unless he has made the disclaimer in absolute and unconditional terms.

Argument for Appellants.

DISCLAIMER SHOULD BE ABSOLUTE.—An answer which disclaims all interest in the land in dispute, except such as the defendant may have under the homestead law, by virtue of the dedication of the land to homestead uses by himself and his wife, is not a disclaimer.

WHAT MAY BE TRIED IN PARTITION.—Under our practice, any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in such action.

ANSWER IN PARTITION.—A defendant in partition is not entitled to have the action dismissed by reason of the force and effect of any defense which he may set up in his answer.

FACTS TO BE FOUND IN PARTITION.—In an action for partition, if the Court finds that the parties hold and are in possession of real property, as joint tenants or as tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, the partition should be made, although the findings may also show that the plaintiff, in his complaint, has incorrectly set forth the title or interest of the parties, or of one or more of them, in the land.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The affidavits in support of the motion to be allowed to file a supplemental complaint, and make Mary Ann De Uprey a party defendant, stated that she claimed a homestead interest in the property. The supplemental complaint contained the same averment, and did not state that she owned any interest in the property.

The other facts are stated in the opinion of the Court.

Cyril V. Gray, for Appellants.

If the declaration of homestead showed anything, it showed a claim of the property by Samuel and his wife, as not being held by them, or either of them, as tenants in common with any other person, and consequently that it was a case for an action of ejectment, and not for partition. It should not, therefore, have been permitted to bring such a question into an action for partition, for it has repeatedly been held that Courts will not undertake to partition property where the title is disputed. (*Wilkin v. Wilkin*, 1 John. Ch. 111; *Phelps v. Green*, 3 John. Ch. 302; *Cox v. Smith*, 4 John. Ch. 271.)

A. Campbell, for Respondent.

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By the Court, SANDERSON, C. J.

This is an action for the partition of a certain lot and improvements in the City of San Francisco. The plaintiff obtained judgment and a decree directing the premises to be sold and the proceeds divided between the parties on the ground that a partition by metes and bounds could not be made without prejudice. The defendants appeal, and assign several errors which we will notice in the order in which they have been presented.

The action was commenced against Samuel De Uprey alone, who demurred to the complaint, and for cause of demurrer alleged that the same did not state facts sufficient to constitute a cause of action. The demurrer was overruled, which ruling constitutes the first error assigned.

The only ground urged in support of the demurrer is that the complaint contents itself with the general allegation that the premises cannot be divided by metes and bounds without prejudice and does not state the facts showing why such a partition could not be made. A complete answer to this is found in the fact that the manner in which the partition is to be made constitutes no part of the cause of action, but is merely a part of the relief. While it is proper and perhaps advisable to ask for a particular mode of partition—there being two provided by the statute—and to that end allege the facts upon which the plaintiff relies for the particular mode which he seeks; yet this is not indispensable, and a complaint which is silent upon the subject is good. No facts need be stated in the complaint except such as are found enumerated in the two hundred and sixty-fourth section, which provides for the cause of action in question and defines the facts upon which it rests; and a specification of the interest of each party interested in the land, so far as known to the plaintiff, as provided in section two hundred and sixty-five. If these sections left the question in doubt, such doubt is entirely removed by the two hundred and seventy-fifth section, which provides that: "If it be alleged in the complaint, and be established

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by evidence, or if it appear by the evidence *without such allegation in the complaint*, to the satisfaction of the Court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the Court may order a sale thereof." But were it otherwise, and were the theory of the appellant the correct one, we should still be of the opinion that his theory is fully satisfied by the complaint in this case. Whether a partition can or cannot be made by metes and bounds is purely a question of fact, and is the ultimate fact to be found, and therefore the only fact necessary to be averred under any system of pleading with which we are acquainted. The constituent facts, or those which lie behind, are merely probative, and need not be averred. But independent of all that has been said, it may be safely affirmed that the bare description of the premises contained in the complaint sufficiently shows that a partition by metes and bounds could not be made without prejudice. It is a city lot fronting on an alley, measuring only twenty-three feet front and extending back sixty. We think it would be difficult to divide such a lot by metes and bounds without great prejudice to the owners.

After the demurrer to the complaint was overruled the plaintiff, upon affidavit and notice, moved the Court for leave to bring in the wife of the defendant by a supplemental complaint. The motion was allowed by the Court against the exception of the defendant, and it is next contended that this order of the Court was erroneous.

We cannot but regard this point as frivolous. Mary Ann De Uprey, as appears by her own answer, not only claimed a homestead right to the premises, but claimed that the entire legal estate was in her, and the Court found that the legal title to an undivided half was in her. She was, therefore, not only a proper party, but a necessary party to the complete determination of the case. All persons having or claiming any interest in the land are not only proper but necessary parties to a suit for partition; and it was not only proper for the Court to allow the motion in question, but it would have been

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error not to have done so. (Practice Act, Secs. 17 and 68.) Admitting, for the sake of the argument, that the showing in support of the motion was insufficient, subsequent events clearly demonstrated the fact that she was a necessary party, and that the ends of justice had been subserved by allowing the amendment. Such being the case, this Court will not disturb an order resting very much in the discretion of the Court below and exercised under a statute containing very liberal provisions upon the subject of amendments.

After the amended and supplemental complaint was filed the defendants separately demurred upon the grounds following: First—Misjoinder of parties defendant, because Mary Ann De Uprey was improperly joined. Second—~~Because~~ several causes of action had been improperly united. Third—Because the complaint did not state facts sufficient.

The demurrers were overruled, which ruling constitutes the third error assigned.

These demurrers were not only frivolous but, under the circumstances of the case, impertinent. The Court had already decided that Mary Ann was a proper party and therefore making her such could not result in a misjoinder. The Court had also decided that the original complaint stated a cause of action and it is clear that it, together with the amended and supplemental, does not state less facts than at first. And so far as the second ground alleged is concerned we cannot perceive that the demurrer has even a respectable pretext to stand upon. It is obvious upon inspection that there is but one cause of action stated in the complaint, and but one kind of relief sought.

This case was certainly contested with a pertinacity worthy of a better cause. After all the demurrers, five in number, had been overruled and the defendants had both answered separately, denying all the allegations of the complaint, their counsel next moved to dismiss the case upon the pleadings without any trial of the issues of fact thus joined between the parties. In view of the fact that the sufficiency of the complaint made by the plaintiff had undergone the test of five

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demurrers, and the further fact that answers, in the absence of all evidence either way, are entitled to no more faith and credit at the hands of the Court than complaints, this motion has at least the merit of novelty.

But it is argued in support of the motion that the pleadings show no cause of action as against Samuel De Uprey, because he disclaimed any interest in the land. Such, however, does not appear to be the fact. His answer does not contain an absolute and unqualified disclaimer. Less than that the plaintiff was not bound to accept. He only disclaims all interest except such as he may have under the Homestead Law by virtue of the dedication of the land to homestead uses by himself and his wife. It may be that such interest did not amount to anything in law, but that was one of the questions which he had helped to make and which the plaintiff had a right to have determined and put to rest by the judgment of the Court. But be that as it may, he could not claim a dismissal of the action upon the ground of a disclaimer unless he made that disclaimer in absolute and unconditional terms. Instead of doing that he denied all the allegations of the complaint as to the plaintiff's title, pleaded two statutes of limitations and averred title in his wife and claimed for himself a right of homestead in the premises, but disclaimed any further interest. It is a misnomer to call such an answer a disclaimer.

The issues made by the answer of Mary Ann De Uprey are:

First—Has the plaintiff any interest?

Second—Has Samuel De Uprey any interest?

Third—Is Mary Ann sole owner of the premises?

Fourth—Has the plaintiff possession?

Fifth—Has the plaintiff been in possession within five years?

Sixth—Has she been in possession within four years?

We are asked if the foregoing questions are such as are cognizable in an action for partition and it is argued that they are not, but are such questions as must be tried in an action of ejectment or to quiet title, if at all, and therefore this case ought to be dismissed on the pleadings without first ascertain-

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ing by a trial whether there is a word of truth in the answer which raises those questions — a conclusion both lame and impotent. The action being confessedly for a partition, so far as the complaint is concerned, we are certainly unable to perceive how the defendants can defeat the action by the mere force and effect of their answers, no matter what they contain. Nor, admitting such to be the fact, are we able to perceive by what rule of law or logic the plaintiff is to be held responsible for what appears in the answer and sent out of Court because the defendants have seen proper to raise questions not cognizable, as they alleged, in an action for partition. On the contrary, if the questions made by the answer are not cognizable in this action it is not the fault of the plaintiff, but of the defendants, and they ought not to have been allowed to make them. But there is nothing in the idea that these questions are of "strange countenance" in an action for partition. Any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties *in the land* may be put in issue, tried and determined in such action. (Prac. Act, Sec. 271.) Such is one of the fruits of the new system of practice which we have adopted, and when contrasted with the practice in such cases at common law, serves to illustrate its superiority.

It is next insisted that the findings negative the averments of the complaint, and the doctrine that the *allegata* and the *probata* must correspond is invoked for the purpose of establishing an error in that respect. The complaint averred that Samuel De Uprey was the co-tenant of the plaintiff, and owned an undivided half of the premises, but upon the trial the Court found that this undivided half did not belong to Samuel but to Mary Ann, and for that reason we are asked to reverse the judgment. This is substantially the same question which we have already twice considered in a different form, and which seems to play the part of Banquo's ghost in this judicial drama. We know of no rule of law which requires the Court, in an action of this kind, to find the facts as alleged or the contrary and not otherwise, nor any rule which cuts off the plaintiff's

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right to a partition because it turns out on the trial that he was mistaken as to the condition of the title of his co-tenants. The plaintiff is required to set forth the interests of all parties known or unknown as far as they are known to him (Sec. 265), and each defendant is required to set forth in his answer, fully and particularly, the nature and extent of his interest. But suppose that either, or both, through mistake or otherwise, set forth their interests incorrectly, it does not follow that no partition can be had. The partition follows all the same, and is to be made according to the finding regardless of the fact whether such finding corresponds with the allegations of the complaint in that respect. The doctrine invoked is applicable to this kind of an action only so far as the facts upon which the right to a partition is founded are concerned, and which are set forth in the two hundred and sixty-fourth section of the statute. The finding must correspond with the allegations of the complaint so far as to show that the parties — plaintiff and defendant — hold and are in possession of the land in question as joint tenants or as tenants in common, and that one or more of them has an estate of inheritance, or for life or lives, or for years. Such are, so to speak, all the issues which are directly and in chief involved in this action, and upon them, if found in favor of the plaintiff, the judgment of the Court is that partition be made. But in order that this judgment may be executed, it is necessary to ascertain what the interests of the respective parties are, if there is any controversy touching them. These latter issues are collateral to the former merely, and do not enter into and become a part of the action within the scope of the rule which counsel have invoked. Whether the finding upon them corresponds with the issues made by the parties or not, is void of legal consequence. The object is not to ascertain whether the allegations of either party in respect to their interests are true or false, but to ascertain what their interests are *according to the evidence*, in order that the decree of the Court directing a partition may be carried into effect.

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The record contains no error, and the judgment must be affirmed.

Ordered accordingly.

EVAN JENKINS v. DANIEL FRINK, G. W. MOODY,
JAMES C. BRALEY, JACOB SHUMWAY, WESLEY
GALLIMORE, AND DANIEL L. MOODY.

ORDER GIVING TIME TO FILE STATEMENT.—An order of Court allowing a party twenty days within which to file a statement on motion for a new trial must be construed as giving twenty days from the date of the order, and not twenty days beyond the time of giving notice, or twenty days beyond the time allowed by statute.

FILING STATEMENT FOR NEW TRIAL.—If a statement on application for a new trial is not filed within the time required by law, the right to move for a new trial is waived, and if a motion to that effect is made, the statement should be stricken out.

PROCEEDINGS TO OBTAIN A NEW TRIAL.—There are three distinct steps recognised by the Practice Act, in a proceeding to obtain a new trial, for the taking of each of which, except the last, a particular period of time is allowed: Firstly—a notice of intention to move for a new trial; Secondly—Filing and serving statement or affidavits; Thirdly—The motion for a new trial. An order extending the time for taking either of these steps should express with precision the object to be attained.

Query?—Should an order allowing time within which to file a motion for a new trial be construed as allowing time to file a statement?

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

Hoge & Wilson, for Appellants.

Patterson, Wallace & Stow, for Respondent.

By the Court, SAWYER, J.

This case was tried by the Court without a jury, and the findings were filed on the 12th of May, 1864. On the same day notice of the filing of the findings was served on defendants' attorney. On the 13th of May, on motion of defendants' counsel, it was "ordered by the Court that said defendants

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have twenty days within which to file a motion for a new trial herein." On the 16th of the same month the defendants Braley and Gallimore filed a notice of motion for a new trial, and served the same on plaintiff's counsel. On the 3d of June following, the same defendants filed and served their statement on motion for new trial. On motion of plaintiff's counsel this statement on motion for new trial was struck out, upon the ground that it was filed too late, and for that reason the motion for new trial was waived under section one hundred and ninety-five of the Practice Act. The appeal is from the order striking out the statement, and the only question is, Was the statement filed in time? We think it was not. Conceding that the order gave the defendants twenty days within which to file a statement, there can be no doubt that the time commenced to run from the date of the order. It does not say twenty days from the date of giving notice of intention to move, or twenty days beyond the time allowed by statute, but simply that "said defendants have twenty days within which to file a motion for a new trial herein." The obvious construction is, that defendants were to have twenty days in all from that time, and so the Judge below construed his own order. This construction was given to a similar order in *Esterby v. Larco*, 24 Cal. 179. The twenty days expired June 2d, and the statement was, therefore, not filed in time.

But the order does not in terms extend the time to file a statement, and it is at least doubtful whether it can be so construed. The statute recognizes three distinct steps in a proceeding to obtain a new trial. Firstly — A notice of intention to move for a new trial, which must be given within five days after the rendition of the verdict, when the case is tried by a jury, and within ten days after receiving written notice of the rendering of the decision of the Judge, or of the filing of the report of the Commissioner or referee, when tried by such officers, unless the time for giving notice is extended by the Court for a period not exceeding thirty days, when the parties do not consent to a longer period, as provided in section five hundred and thirty. Secondly — Filing and serving

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statement or affidavit; which must be done within five days after giving notice of intention to move, unless the time is extended by the Court for a period not exceeding twenty days, or by consent of parties (Practice Act, Section 195); and Thirdly — The motion, or in the language of the statute, “the application for new trial;” which “shall be made at the earliest period practicable after filing the affidavits or statement.” (Section 196.) “An application for an order is a motion.” (Section 515.) The motion, then, is a distinct and separate step in the proceedings, and subsequent to the notice of intention to move, and to the filing of the statement. The order does not in terms purport to give time to serve a notice of intention to move for a new trial, or to file and serve a statement, but only time “within which to file a motion for a new trial.” This language is strictly applicable to the last step in the proceeding only. Doubtless the defendants intended to procure time to file statement. But as the statement was not filed within the twenty days given, it is unnecessary to decide this question. We refer to the form of the order for the purpose, only, of again calling attention to the necessity of seeing that orders procured are entered in such terms as to express with precision the object to be attained. (See *Bear River and Auburn Water and Mining Company v. Boles*, 24 Cal. 355, on this point.)

The order appealed from must be affirmed. The first fifty printed pages in the transcript might have been omitted. All that was necessary to constitute the transcript on appeal was the order appealed from, affidavit of Wallace, the notice of motion to strike out, statement on appeal and notice of appeal, which are all comprised in about eleven pages of the transcript.

Order striking out statement on motion for new trial affirmed with costs.

Mr. Justice RHODES expressed no opinion.

THE PEOPLE v. PRESTON HODGES.

PLACE OF TRIAL OF ACCESSORY.—An accessory before or after the fact in the commission of a public offense must be indicted and tried in that county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county.

WANT OF JURISDICTION APPEARING ON TRIAL.—When it becomes manifest in the course of the trial of a person indicted as an accessory, that the offense of the accessory was committed in another county than that where the indictment was found, the Court should, on its own motion, discharge the jury and commit the accused to await a warrant from the proper county.

ARREST OF JUDGMENT IN CASE OF ACCESSORY.—If the evidence shows that the offense of the accessory was not committed in the county where the indictment was found, the Court should arrest the judgment without a motion to that effect being made.

DISTINCTION BETWEEN ACCESSORY AND PRINCIPAL.—A person who incites, counsels, hires, or commands another to commit a crime, but is not within such convenient distance as to be able to come to the immediate assistance of his associates, if required, or to watch to prevent surprise, is an accessory, and not a principal in the second degree.

APPEAL from the District Court, Eleventh Judicial District, El Dorado County.

J. G. McCallum, J. M. Williams, and Coffroth & Spaulding,
for Appellant.

J. G. McCullough, Attorney-General, and J. C. Goods, for
Respondent.

By the Court, SHAFER, J.

Thomas B. Pool was indicted, jointly with three others, by the Grand Jury of the County of El Dorado, for the murder of Joseph M. Staples, which murder was alleged to have been committed in said county, July 1, 1864; and it was further charged in the indictment that Hodges, the appellant, within said county, "incited, counselled, hired and commanded" the said Pool and others to commit the said murder.

The appellant, on a separate trial, was found guilty by the jury of murder in the second degree, and he was thereupon sentenced by the Court to confinement in the State Prison for the period of twenty years.

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There is only one question in the case necessary to be considered.

It appeared from all the testimony introduced at the trial, that the acts wherewith Hodges stood charged, were performed by him in the County of Santa Clara, over two hundred miles distant from the scene of the murder; and on that ground, it is now insisted for the appellant that the District Court for the Eleventh Judicial District, in which the trial and conviction were had, had no jurisdiction of the offense charged against him.

We consider the objection to be well taken. Section ninety-three of the Criminal Practice Act is as follows: "In the case of an accessory before or after the fact in the commission of a public offense, the jurisdiction shall be in that county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county." By section two hundred and fifty-five, all persons connected in the commission of a felony, whether they directly commit the act constituting the offense, or aid and assist in its commission, though not present, are to be indicted, tried, and punished, as principals. To that extent "all distinction between an accessory before the fact and a principal, and between principals in the first and second degree," is expressly abolished by the section.

There is no conflict between these sections. The latter (Section 255) requires that an accessory should be indicted, tried and punished in the same manner as principals; and section ninety-three fixes the place at or in which those events are to transpire.

Though the common law distinction between principal and accessory is in the main obliterated, yet it is retained for the purposes of venue. Sections eleven and twelve of the Act entitled "Crimes and punishments," define the term "accessory." Section two hundred and fifty-five of the Criminal Practice Act relates to the frame of the indictment against an accessory, the method of trial, and the measure of punishment; and section ninety-three determines the forum having juris-

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diction of the offense. It is suggested, however, on behalf of the People, that the evidence establishes that Hodges was a principal in the second degree and not an accessory. This position is not tenable, for there was no evidence tending to prove that Hodges, at the time when the murder was committed, was "at such convenient distance as to be able to come to the immediate assistance of his associates if required, or to watch to prevent surprise, or the like." (Arch. Crim. Prac. 11.) It is further insisted that the objection to the jurisdiction on the part of the appellant comes too late, no motion in arrest on that ground having been made in the Court below. When it became manifest, in the progress of the trial, that the Court had no jurisdiction of the offense, the jury should have been discharged, (Crim. Prac. Act, Sec. 382,) and the Court, on its own motion, should have committed the accused to await a warrant from the proper county for his arrest. (Ib. Sec. 383.) Again, by section four hundred and forty-three the Court was authorized, "on its own view of the jurisdictional defect, to arrest the judgment without motion." As it is apparent on the face of the record that the whole of the proceedings were *coram non iudice*, the judgment cannot be permitted to stand, even though the motion in arrest was not, in terms, based upon that objection.

Judgment reversed and cause remanded.

DAVID MAHONEY v. JAMES E. NUTTMAN, MARCUS HARLOW, JOS. P. AMES, AND JAMES BYRNES.

TOLL ROAD IN SAN MATEO COUNTY.—The Act of March 24, 1863, entitled "An Act to allow James E. Nuttman, Marcus Harlow, and their associates or assigns to construct a toll road in the County of San Mateo," does not confer upon said Nuttman and Harlow, and their associates or assigns, the right to appropriate the county road then in use in San Mateo County to their use and purposes for such toll road.

APPEAL from the District Court, Twelfth Judicial District, San Mateo County.

Opinion of the Court.

The facts are stated in the opinion of the Court.

G. F. & Wm. H. Sharp, and Sharp & Lloyd, for Appellants.

T. J. & M. Bergen, for Respondent.

By the Court, CURREY, J.

This action was brought to enjoin proceedings under an Act of the Legislature entitled "An Act to allow James E. Nuttman, Marcus Harlow and their associates or assigns to construct a toll road in the County of San Mateo," passed in March, 1863. (Laws 1863, p. 99.) Upon filing the complaint a preliminary injunction was granted, and by final decree the same was made perpetual.

The portion of the Act on which the appellants allege the right to appropriate the county road for their use as a toll road reads as follows: "The right to construct and maintain a toll road in San Mateo County is hereby granted to James E. Nuttman, Marcus Harlow and their associates or assigns, for the period of twenty-five years from the passage of this Act; said road to begin at the point of-intersection where the present road crosses the northern boundary line between San Mateo and San Francisco Counties, and thence with said county road to the point where the same intersects with the southern boundary line of San Mateo County." The parties were required, within a year after the passage of the Act, to open, grade and construct the road, to the width of at least thirty feet, and at all times to keep and maintain the same in thorough repair, taking and receiving for the use of said road from the public the tolls therein specified. Further, by the third section of the Act they were empowered to take, condemn and appropriate such lands as might be necessary for the construction of the road, or the right of way thereof, upon payment to the owners or claimants of such lands the ascertained value thereof, according to the provisions of the Act of May 20, 1861. (Laws 1861, p. 607.) Subsequently, in April, 1863, at the same session, another Act was passed,

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entitled "An Act supplemental to and explanatory of an Act entitled 'An Act to allow James E. Nuttman, Marcus Harlow and their assigns, to construct and maintain a toll road in the County of San Mateo, passed March twenty-fourth, eighteen hundred and sixty-three,' which reads: 'That portion of section one of the above entitled Act, which reads as follows, to wit: Said road to begin at the point of intersection where the present county road crosses the northern boundary line between San Mateo and San Francisco Counties, and thence with said county road to the point where the same intersects with the southern boundary line of San Mateo County,' shall not be so construed as to grant or confer any rights or privileges to the said James E. Nuttman, Marcus Harlow or their assigns, to construct, build or maintain a toll road over or upon the whole or any portion of the county road running through the County of San Mateo, from the northern to the southern line of said county, and known as the San José and San Francisco County Road; nor shall any part or parts of said Act be so construed as to authorize or empower the said James E. Nuttman, Marcus Harlow or their assigns, to charge and collect any toll upon the whole or any portion of said county road; nor shall the said James E. Nuttman, Marcus Harlow or their assigns, acquire any rights or privileges under and by virtue of the above entitled Act to obstruct, in any manner or way whatsoever, the full enjoyment and free use of said county road, or any portion of the same, to the public." (Laws 1863, p. 361.)

The appellants claim that, under the first Act referred to they have the right to appropriate the county road named in these Acts, and acting upon this construction of their rights under the grant of the franchise, were appropriating the same until enjoined in this action; and further, that the supplemental and explanatory Act cannot vary, alter or impair the rights acquired, as they allege, under the first Act.

What was granted by the Act of March, 1863, is the subject first to be considered, and the determination of this ques-

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tion against the appellants' pretensions will make an end of the case.

The grantees named in the Act were authorized to construct a road—not to appropriate to their own use the county road which was already constructed. And in the construction of this road the right was granted to Nuttman, Harlow and their associates or assigns to take, condemn and appropriate such lands as might be necessary for its construction, or the right of way thereof, upon paying to the owners or claimants of said lands its value to be ascertained as provided by law. The county road was recognized by the Legislature as existing when the Act was passed; and hence it cannot be fairly presumed that it was intended the lands over which it passed and which were already condemned, to every practical intent, and appropriated by the public as a highway, were the lands to be condemned and appropriated for the construction of the new road. The subject matter granted is distinctly expressed by the Act of the Legislature, and is set forth therein as the aggregate thing of paramount prominence and importance. The effect of the Act cannot be controlled by the fact that it is therein provided that the road to be constructed was to begin at the point of intersection, "where the present county road crosses the northern boundary line between San Mateo and San Francisco Counties," and was to run "thence with said county road to the point where the same intersects with the southern boundary line of San Mateo County." Primarily, the word "at" expresses the relations of presence, nearness in place or time, or direction toward, and it is less definite than "in" or "on." (Webster's Dic.) The precise sense in which the word may be used, must be ascertained from its connection with the other and more substantive words of the sentence of which it is a part. Here the words "at the point of intersection" should be read in connection with the words of the grant in the statute, to wit: the grant of the right to construct a road which was to run *with* the county road and not *upon* it, and which was to pass over lands which it was contemplated by the Act should be condemned and appropriated

Points decided.

upon paying to the owners or claimants thereof the just value of the same.

We are of the opinion that a fair construction of the Act of March, 1863, gave to the grantees or donees named therein, no right to appropriate the county road to their use and purposes, and that the Act of April, 1863, was not necessary to explain its object and meaning, and therefore we deem it unnecessary to pass upon the effect of the last Act.

Decree affirmed.

Mr. Justice RHODES expressed no opinion.

EDWARD P. REED v. JAMES ELDREDGE.

SPECIFIC CONTRACT ACT.—The Act of April 27th, 1863, commonly called the "Specific Contract Act," does not authorize the rendition of a judgment to be paid and collected in a specific kind of money, except in an action on a contract or obligation in writing made payable in a "specific kind of money or currency," or in an action for the recovery of money received in a fiduciary capacity or to the use of another.

ACTION ON JUDGMENT RENDERED PRIOR TO APRIL 27th, 1863.—In an action upon a judgment rendered prior to the passage of the Act of April 27th, 1863, commonly called the "Specific Contract Act," the Court has no power to annex to the judgment rendered an order or direction specifying the kind of money in which payment must be made in satisfaction of the judgment.

JUDGMENT AT COMMON LAW.—At common law, the judgment of the Court was, that the plaintiff recover his debt or damages, or debt and damages, as the case might be, without any order or direction specifying how the money should be paid by the debtor or made by the officer. After judgment, the law, and not the Court, directed what proceedings should be had for the purpose of satisfying the amount adjudged to be due.

COMMON LAW.—Upon the adoption of the common law in this State, the Courts became subject to all its provisions, except in so far as the statutes worked a change in the common law rules.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

Shafter, Gould & Dwinelle, for Appellant.

Patterson, Wallace & Stow, for Respondent.

Opinion of the Court.

By the Court, RHODES, J.

The plaintiff alleges in his complaint that in 1861 he recovered a judgment in the District Court against the defendant for the sum of one thousand and fifty-nine dollars and costs of suit, which judgment remains in full force, and that he has not obtained any execution or satisfaction of the judgment, whereby an action accrued to him to demand and have of the defendant the several sums of money mentioned in the judgment, wherefore he prays for judgment for the amount of principal, interest, and costs of the judgment of 1861, "to be paid in the current United States gold and silver coin only," and for costs of suit, payable in the like current gold and silver coin only. The action was commenced December 5, 1863, and, the defendant having made default, judgment was rendered by the Court at the January term, 1864, for the amount of the former judgment and interest, together with costs of suit, the whole amount "to be paid by said defendant in current gold and silver coin only," and the Sheriff was directed to receive, in satisfaction of the execution to be issued, nothing but current gold and silver coin.

The defendant appeals from the judgment alone, and the question is, do the facts stated in the complaint authorize the Court to annex to the judgment for the recovery of the amount due, the direction that it be paid in a particular kind of money?

The counsel for the plaintiff have directed their efforts mainly to prove that the judgment of 1861 was payable in the gold and silver coin of the United States only, because it was contracted before the passage of the Legal Tender Act of Congress of July 11, 1862, and because, as they hold, a debt existing at the passage of the Act is not included within the words of the Act, "all debts," according to their true meaning, when interpreted by the recognized rules of legal construction. But that question is not necessarily involved in the case.

The first point to be determined is: had the Court the power

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to annex to the judgment rendered upon the facts stated in the complaint, an order or direction specifying the kind of money in which payment must be made in satisfaction of the judgment? If the Court did not possess the power the judgment is erroneous.

The judgment upon which the action was brought, was a contract for the payment of a sum of money evidenced by the record of a Court. The debt secured by it differs in no manner from a simple contract debt, though the evidence of the existence of the debt is of a higher and more solemn character than that by which a simple contract debt is proven. Upon proof being made in either case of the existence of the debt it becomes the duty of the Court to render judgment for the amount found due. In either case an action at law is brought to recover a sum of money alleged to be due the plaintiff in the action. The cause of action is simply a demand for the payment of a sum of money. At common law, when an action was brought on a judgment or any contract for the payment of money, the judgment of the Court was that the plaintiff recover his debt or damages or debt and damages, as the case might be, without any order or direction specifying how the money should be paid by the debtor or made by the officer. The Court adjudged that the plaintiff do have and recover of the defendant the specified sum of money, and from that point the law—not the Court—directed what proceedings should be had for the purpose of satisfying the amount adjudged to be due. Upon the adoption of the common law in this State the Courts became subject to all its provisions, both as to their powers and the mode of procedure, except in so far as the statutes worked a change in the common law rules. We doubt if an instance can be found where a Court possessing common law jurisdiction has assumed, in rendering judgment in an action for the recovery of a debt, to add to the judgment a direction similar or even analogous to that found in this case. No facts are stated in the complaint that would require a different judgment to be entered than was required at common law in any case on a contract for the payment of

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money only; and if the necessary facts had been stated in the complaint, no Court but one possessing and exercising equity powers could, in the absence of authority conferred by statute, grant the relief prayed for. The plaintiff has not cited any rule of the common law or provision of the statute conferring upon the Court authority to make the order in this case. The statute did not confer the power to make an order in an action at law, requiring the money recovered to be paid or collected in a specific kind of money, until the passage of the Act of April 27, 1863, commonly called the "Specific Contract Act." The statute engrafted upon the remedies of a general nature, that Courts of common law jurisdiction could afford, in an action at law, one of the remedies peculiar to Courts of equity, which in its nature is analogous to a decree for a specific performance; and it restricted the additional relief to a specified class of cases. That Act is not applicable to this case, for it provides, that a judgment of the character of the one before us may be entered in an action on a contract or obligation in writing made payable in a "specific kind of money or currency," or in an action for the recovery of money received in a fiduciary capacity, or to the use of another, and no authority is given to the Court, in any other case, to render a judgment in an action at law, to be paid in a specific kind of money.

That portion of the judgment that requires the amount of the judgment and costs to be paid and collected in current gold and silver, is erroneous.

It is ordered that the cause be remanded to the Court below with directions to modify the judgment, by striking out those portions of it requiring the defendant to pay the sums therein specified in gold and silver coin only, and ordering an execution to be issued, and requiring the Sheriff to receive in its satisfaction nothing but current gold and silver coin.

Argument for Appellant.

MOSES ELLIS v. CHARLES B. POLHEMUS, ADMINISTRATOR OF THE ESTATE OF H. P. JANES, DECEASED.

RATE OF INTEREST ON CLAIMS AGAINST INSOLVENT ESTATES.—If the estate of the deceased is insolvent, the administrator cannot pay more than ten per cent interest per annum, from and after the time of issuing letters, on any claim against the estate contracted after May 20th, 1861, even if the rate of interest specified in the contract is more than ten per cent per annum, and the claim is secured by a mortgage.

CLAIM AGAINST AN ESTATE.—*Per Sanderson, C. J.*—The word "claim" as used in the Act concerning the estates of deceased persons, when it speaks of claims against an estate, is broad enough to include a mortgage.

CASES COMMENTED ON.—The cases of *Fallon v. Butler*, 21 Cal. 24, and *Ellison v. Halleck*, 6 Cal. 386, and *Faulkner v. Folsom's Executors*, 6 Cal. 412, commented on.

Per Rhodes, J.—A note secured by mortgage is a claim against the estate, but the mortgage given to secure the note is not such claim.

Per Shafter, J., Sawyer, J., concurring.—The word "claim," as used in the one hundred and thirty-first section of the Act concerning the estates of deceased persons, includes mortgages as well as claims at large against the estate.

APPEAL from the Probate Court, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Mastick & Gray, and John T. Doyle, for Appellant.

The question presented is simply whether the Act of May 20, 1861, section forty, (Laws, p. 637,) applies to such a case as this or not. The words of the statute are broad enough to cover it, if such was clearly the intent; and, on the other hand, no violence will be done to the words of the Act by excluding it, if such was not the intent. The meaning and intent, then, of that amendment to the Probate Act are what we have to ascertain. To arrive at the true intent of the amendment here in question, we must read it in connection with the rest of the Act, and the decisions of this Court expounding and interpreting its other parts. The question naturally resolves itself into a consideration of the import of the words "*claim against the estate*," and the term "*insolvent*," as used in this Act. Is a mortgage or lien on specific property a "*claim against the estate*" within the meaning of this Act? Is the estate of the deceased "*insolvent*" *quoad* this

Argument for Appellant.

claim within the meaning of the Act? These are the questions.

A mortgage is not a claim against the estate, because it may be and frequently is *less* than a claim. For example: A mere dry mortgage, not founded on or collateral to a debt to be paid, but simply a mortgage of the land conditioned for the payment of so much money, for which there is no personal promise. Suppose the appellant's mortgage had been of this character—he would not have had a claim against the estate, for he would not have had a right to receive from the administrator anything save out of the proceeds of the land mortgaged. Suppose a note secured by mortgage, and the mortgagee afterwards releases the personal liability of the mortgagor, agreeing to look to the land alone for his payment; in such case, if the mortgagor dies insolvent, the mortgagee's right to his interest cannot be affected; because, by express contract, he has renounced and released all claims against the deceased, his heirs, executors, and administrators. If the learned Judge below was right in his decision, it would appear to follow as a corollary from it, that an administrator would have no right to accept a release of the personal liability of the deceased on a debt secured by a mortgage, or that in doing so he took the risk of the solvency of the estate. If this be so, it is about the only imaginable case wherein a *release* would, in effect, become a cause of action in favor of the releasor against the releasee.

The decision of the Supreme Court in *Fallon v. Butler*, 21 Cal. 24, is, in our judgment, conclusive of the question here involved. The meaning of the words, "claim against the estate," as used in the Probate Act, are there examined, and it is held that they are to be deemed synonymous with "debts and demands against the decedent, *which might have been enforced against him in his lifetime by personal action for the recovery of money, and upon which only a money judgment could have been rendered.*"

W. H. L. Barnes, for Respondent.

Argument for Respondent.

It is urged that this claim is not subject to the provisions of section one hundred and thirty-one of the Probate Act, because it is a claim which was secured by mortgage, and did not run against the body of the estate in the first instance; that, therefore, it is not a claim against the estate within the meaning of the Probate Act.

Nothing can be found in the Probate Act itself to justify this view. In providing the mode in which claims against estates shall be presented and allowed, it makes no distinction between secured and unsecured claims, except that it requires, in the case of a claim secured by mortgage of real estate, a description of the security, and a reference to the date, volume, and page of its record in the office of the County Recorder of the county where the land mortgaged lies. (Probate Act, § 133.) This being done, and the claim having been allowed, approved, and filed, it is ranked among the acknowledged debts of the estate, to be paid in the due course of administration. (Ib.) The claim, thus filed, may be paid as a claim against the body of the estate in the due course of administration, and the lien discharged or released, as would of course be the proceeding in a solvent estate; or, if a sale is made of land subject to mortgage, or other lien, which is a valid claim against the estate of the deceased, the purchase money shall be applied, after paying the necessary expenses of the sale, first, to the payment and satisfaction of the mortgage or lien, and the residue in the course of administration. (Ib. § 186.) So that, so far as the Probate Act is concerned, there is no discrimination between unsecured and secured debts; both are claims against the estate and the whole of it, save that the secured debt shall have the proceeds of the security applied to its payment, if the security is sold. The secured debt is still a *claim* against the estate, having rights as to a specific portion of it in certain contingencies, but which, it is presumed, will be paid in the due course of administration. The presentation, allowance, and filing of such a claim are not steps to foreclose a specific lien on a part of an estate in the control of the Probate Court, with no reference to anything but the

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lien and its foreclosure. These acts simply place such claim before the Court, precisely as any other. The language of the section in question (§ 131) is very broad, "broad enough to cover the present case, if such was clearly the intent," say the learned counsel on the other side. We may add to this that while the statute is broad enough to cover this case, there is no provision to be found which takes the case out of the operation of the rule so broadly laid down.

By the Court, SANDERSON, C. J.

On the first day of April, 1862, Horace P. Janes gave to Moses Ellis his promissory note for twenty-five thousand dollars, payable one year from date, with interest at the rate of one and one quarter per cent per month, payable monthly; and to secure its payment gave a mortgage on certain real estate in the City of San Francisco. Janes died before the note matured. It was duly presented to the administrator of the estate of Janes, was allowed by him, and approved by the Probate Judge, and thereupon filed in the Probate Court, on the 12th of August, 1863, as a valid claim against the estate.

The administrator paid the interest on the claim, at the rate of one and one quarter per cent per month, to December 28, 1863. Subsequent to the last payment of interest, the administrator sold the mortgaged premises, and the proceeds of the sale were more than sufficient to pay the debt and interest at the rate specified in the note. Whereupon Moses Ellis filed his petition in the Probate Court, and sought to compel the administrator to account for his proceedings in the matter of the sale, and to pay to the petitioner twenty-five thousand dollars, with interest at the rate of one and one quarter per cent per month from the 28th day of December, 1863.

The foregoing facts were admitted by the administrator; but it further appeared that the estate of the deceased was insolvent; and that the fact of such insolvency was not discovered by the administrator until the 6th day of January, 1864. The Court ordered the administrator to pay the peti-

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tioner twenty-five thousand dollars, with interest at the rate of ten per cent per annum only, from the date of the letters of administration, to wit: November 9, 1862, less all sums of money which had been paid as interest since that day. The petitioner appealed, and now claims that the Court below erred in holding that he was entitled to ten per cent per annum only instead of one and one quarter per cent per month according to the terms of the note.

The one hundred and thirty-first section of the Probate Act provides, among other things, that "In case the estate is insolvent, no claim contracted after the passage of this Act shall bear greater interest than ten per cent per annum from and after the time of issuing letters." The foregoing became a part of the law of the land on the 20th of May, 1861 — nearly a year before the note and mortgage in question were made.

But it is insisted that this note is not a claim within the meaning of the foregoing provision, and is not subject to it, because it is secured by mortgage, and therefore does not run against the body of the estate in the first instance; and in support of this view the case of *Fallon v. Butler*, 21 Cal. 24, is cited. Whether that case states the law as correctly as *Ellison v. Halleck*, and *Faulkner v. Folsom's Executors*, 6 Cal. 386 and 412, which it overrules, admits of serious doubt. The meaning of the word "claim" is broad enough to embrace a mortgage or any other lien, and in the one hundred and eighty-sixth section of the Act, mortgages and other liens are expressly mentioned as valid claims against the estate. This section received no special notice, though it was cited in the brief of counsel, at the hands of the Court in *Fallon v. Butler*, yet it seems to have a very significant bearing upon the question there discussed and determined. But be that as it may, it is clear that *Fallon v. Butler* does not decide that a note when secured by a mortgage is not a claim against the estate. On the contrary, it goes no further than the naked lien of the mortgage, which, for the purposes of the question then before the Court, was regarded as something "distinct" from the note, and I am not disposed to extend the doctrine of that case

Opinion of Rhodes, J., concurring specially.

beyond its exact limits. The word "claim" is not only broad enough to include a mortgage, but if there was any doubt upon that point it would seem to be removed by the language of the one hundred and thirty-third section, which provides that "if the claim be founded on a bond, bill, note or *other instrument*, the original shall be presented," etc. This language was added to the section in 1861. When the case of *Fallon v. Butler* was tried in the Court below does not appear from the report, and it is possible that it was tried before section one hundred and thirty-three was so amended.

The note in question was presented for allowance to the administrator and the Probate Judge, and thereupon filed in the Probate Court. It was a valid claim against the estate, and having been allowed and filed, took rank, in the language of section one hundred and thirty-three, "among the acknowledged debts of the estate, to be paid in due course of administration," under the direction of the Probate Court. The estate being insolvent, this claim, as well as all others, became subject to the provisions of section one hundred and thirty-one, and the petitioner only entitled to interest at the rate of ten per cent per annum, from and after the date of the letters of administration, and there was no error on the part of the Court in so holding.

Per RHODES, J., concurring specially.

I concur in the judgment affirming the order of the Probate Court; and I agree with the Chief Justice in the opinion that a promissory note, executed by the deceased in his lifetime, whether it is secured by a mortgage or not, is a claim against the estate; but, in my opinion, the mortgage, which is but a security for the payment of the note—a mere incident to the debt—is not, in any just sense, a claim against the estate to be presented for payment.

The mortgage debt is required to be presented for payment, and when paid either by the administrator or on proceedings to foreclose the mortgage, it operates as a satisfaction—not

Opinion of Rhodes, J., concurring specially.

payment—of the mortgage. The mortgage or an abstract thereof may be required to be filed in the Probate Court with the debt, for the purpose of enabling the Court to make the proper order for the payment of the claims, and give the requisite preference to liens upon any of the assets of the estate. The statute as amended in 1861 (Probate Act, Sec. 133) seems to recognize the distinction between a claim and its security, for it says: "If the claim or any part thereof be secured by a mortgage or other lien, such mortgage or other evidence of lien shall be attached to the claim and filed therewith, unless the same be recorded," etc.

The provisions of this section may at first view seem to conflict with section one hundred and eighty-six, where provision is made for the appropriation of the proceeds of the sale of "land subject to any mortgage or other lien, which is a valid claim against the estate of the deceased," but the apparent conflict vanishes when it is remembered that a mortgage is not, in fact, a debt against the estate. The meaning and evident intent of the Legislature was to provide for the appropriation of the purchase money arising from the sale of "lands subject to any mortgage or other lien [given to secure the payment of a debt] which is a valid claim against the estate of the deceased," etc. It is further provided in the section that the money arising from the sale of the land, after the payment of the expenses, shall be first applied to the payment of the mortgage or lien, meaning, of course, the debt, the claim secured by the mortgage or other lien.

The judgment affirming the order of the Probate Court, directing that the note should bear interest at the rate of ten per cent per annum from the date of the letters of administration, does not conflict with the opinion of the Court in *Fallon v. Butler*, 21 Cal. 24, which holds that a mortgage is not a claim in the sense in which that term is employed in the Probate Act. The note was filed as a claim against the estate, and payment was sought from the administrator out of the general assets of the estate, and as the note was made after the passage of the amendments of 1861, and the estate was

Opinion of Shafter, J., Sawyer, J., concurring.

insolvent, the note must be subject to the same rule, in respect to the interest to be paid, as other notes filed as claims, which are to be paid by the administrator in due course of administration. Although such is the law in respect to the note and the interest to be paid, in case the estate is insolvent, I see no inconsistency in holding at the same time that the mortgage is not a claim against the estate, and that an action may be brought in the District Court for the enforcement of the mortgage lien by a foreclosure and a sale of the premises for the payment of the debt and interest, but what rate of interest, I do not undertake to determine.

Per SHAFTER J., SAWYER J., concurring.

There is, in my judgment, no ambiguity affecting the word "claim" as used in the one hundred and thirty-first section of the Probate Act. However it may be in other sections, still in that section it is not limited to claims against the estate at large, as distinguished from claims secured by mortgage upon a part or upon the whole of it. The substance of the provision is that all claims having their origin in contract shall draw only ten per cent per annum, after letters of administration have been issued, if the estate of the decedent shall have been insolvent. The appellant in this case had two distinct claims—the note and the mortgage—and as each of them had its origin in contract, both of them are within the scope of the word "claim" as limited in the section; and whether considered severally, or in their relations to each other, they are directly within the ten per cent provision of the section; and as no other question than that has been raised by counsel for our consideration I concur in the affirmance of the order, on the ground stated in this opinion.

Opinion of the Court.

R. H. VANCE v. GEO. OLINGER AND JOS. LAYCOCK.

FORMER SUIT PENDING AS A DEFENSE IN EJECTMENT.—A defendant in an action to recover the possession of land is not entitled to a judgment of dismissal on the ground that a former suit between the same parties, brought for the recovery of the same land, is still pending, unless it is averred in the answer that the second action is for the same injury as the first, and that the same matters are in issue that were in issue and might have been tried in the first action.

SUITS IN EJECTMENT.—A party may have two suits against the same defendant for the recovery of the same land pending at the same time, if the second is brought on a title acquired after the commencement of the first.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The facts are stated in the opinion of the Court.

Wheaton, and *Hartley*, for Appellants.

John Reynolds, for Respondent.

By the Court, SAWYER, J.

This is an action for the recovery of land.

The complaint was filed December 29, 1859. The defendant, Olinger, in his answer, alleges that, "on or about the 2d of March, 1857, the said Robert H. Vance brought an action of ejectment in this Court against this defendant and one John McComb for the same tract or parcel of land now sued for in this action, and to which the said defendants appeared, and this defendant says the former suit so brought by the said plaintiff is still pending in this Court, and has never been determined," and he prays to be hence dismissed.

The jury found a general verdict for plaintiff, and in addition thereto found specially as follows, to wit: "We, the jury, find that the plaintiff commenced a former action in this Court, on the 7th day of March, 1857, to recover possession of the same land described and sued for in this cause, against the defendant, George Olinger, and one McComb; that said action is still pending and undetermined in this Court. That both

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defendants in that action appeared in that action, and filed the answers which appear on file in that action."

Both parties moved for judgment on the verdict. Plaintiff prevailed, and defendants appealed. It is claimed, that, on the special finding, defendants were entitled to judgment of dismissal, on the ground that there was another action pending for the same cause of action. The case of *Caperton v. Schmidt*, 26 Cal. 479, is relied on as settling the law in this State, that in an action to recover lands, as well as in other actions, a former recovery is a bar. But the difficulty is, neither the answer, nor the special verdict, states facts sufficient to show that the cause of action in the second suit, is the same as that involved in the first. It is a suit to recover the same land, it is true, but it nowhere appears that the same title is in question, or that the same injury is complained of. There is no averment to that effect in the answer, and nothing of the kind appears in the special verdict. For aught that appears, the plaintiff may have acquired the title since the commencement of his former action. Suppose the first action had been tried and determined in favor of the defendants, and the answer had averred that fact, instead of averring that the suit was still pending, but averred nothing more. It certainly would not be pretended that such an answer would be sufficient to show, that the matters in controversy in this action had been adjudicated. The second action was commenced nearly three years after the first. The plaintiff might not have had the title at the time of the commencement of the first action, and for that reason he might have failed to recover; yet he may have acquired the title since, and, upon such newly acquired title he may be entitled to recover in his present suit. [It is not sufficient that the second action is brought to recover the same land. It must be for the same injury, and the same matters must be in issue that were in issue and might have been tried in the first action, otherwise the causes of action are not identical.] If a judgment in the first suit would not be conclusive in the second, the pendency of the former action cannot defeat the second. Neither the answer, nor the special

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verdict states facts sufficient to show that the causes of action in the two suits are the same, and judgment was properly entered upon the verdict for the plaintiff.

This is the only error assigned on the judgment roll. The appeal is from the judgment only, and there is no statement on appeal. As we are confined to the judgment roll on this appeal, the questions arising on the motion for new trial are not before us.

Judgment affirmed.

Mr. Justice CURREY, being disqualified, did not participate in the decision of this case.

THE AMERICAN COMPANY v. G. F. BRADFORD, A.
J. McGUIRE, JAMES MOYLE, A. McCORMICK, D.
McKINNE, FRED. W. PARKER, SAMUEL HARRIS,
WILLIAM STEGEMAN, AND THOMAS WHITE.

SPECIAL VERDICT OF A JURY.—It is the province of the Court to determine as to what particular facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question to be submitted to the jury.

ACQUISITION OF RIGHT TO USE WATER BY PRESCRIPTION.—The use of water in any particular way for a period corresponding to the time limited by statute within which an action must be commenced to determine the right to it, raises a presumption of title to the same in the person enjoying the same as against a right in any other person, which might have been but was not asserted; but in order that this presumption of title may be conclusive, the right to the use of the water must have been asserted under a claim of title with the knowledge and acquiescence of the person having a prior right, and must have been uninterrupted.

BURDEN OF PROVING RIGHT TO WATER BY ADVERSE USE.—The burden of proving an adverse uninterrupted use of water for five years, with the knowledge and acquiescence of the person having a prior right, is cast on the party claiming it; and if he leaves it doubtful whether the use was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor.

FAILURE TO PLEAD FIVE YEARS ADVERSE USE OF WATER.—The party claiming a right to the use of water by five years adverse possession, must set up the same as a defense in his answer; and if he does not, he loses the right to introduce evidence in support of it, and to have the Court instruct the jury in relation to it.

DECREE ENJOINING USE OF WATER.—A decree enjoining the owners of a mining claim, situated on a creek below a dam at the head of a ditch, from diverting any water from or in any manner interfering with the waters of

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the creek that rise above the dam, does not prevent the owners of the mining claim from using the waters of the creek which may flow down the same after the ditch is supplied.

APPEAL from the District Court, Tenth Judicial District, Sierra County.

The facts are stated in the opinion of the Court.

Williams & Johnson, for Appellants.

We admit that in the case of lands adverse possession only affects the remedy; and that a party could never, by adverse possession, acquire the legal title, though he could acquire the legal right to possession, and that therefore the Statute of Limitations would have to be pleaded.

But we contend the rule is very different in case of the use of the waters of a running stream. In case of such use, the right thereto is by lapse of time ripened into an absolute title; and as we need not plead the kind of title, or the number of titles we have and rely on, it is not necessary to set up the Statute of Limitations. It is only where the remedy is affected by adverse enjoyment that we must plead the Statute of Limitations; we need do no such thing where an absolute right is conferred.

We contend, also, that under the doctrine "that the jury may presume a grant," we may set up title in ourselves, or right by purchase; and if our deed is lost, or if we never had one, we may show by the evidence that we have enjoyed the use of the waters for a time corresponding to the local Statutes of Limitation, and that is of itself evidence that such deed was given, and is just as good evidence as the deed itself would be. And again, if we show a deed was given, as in this case, and then show that we, under that deed, used the water for five years, plaintiffs acquiescing in our right under that deed, that will be conclusive that the party making the deed had the power to sell and convey all the rights we enjoyed under that deed.

Mr. Washburne, in his able work on Easements and Servitudes, (p. 20,) says: "It may therefore be stated as a general

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proposition of law, that if there had been an uninterrupted user and enjoyment of an easement—a stream of water for instance—in a particular way, for more than twenty-one or twenty, or such other period of years as answers to the local period of limitations, it affords conclusive presumption of right in the party who shall have enjoyed it; provided such use and enjoyment be not by authority of law, or by or under some agreement between the owner of the inheritance and the party who shall have enjoyed it.”

Then it would seem from the law that if we have a deed, and that we have used the waters in question for a time corresponding to our Statute of Limitations, that our right to continue the use of the waters is perfect, unless we had first ignored our deed, or unless we had began the use of the waters by an agreement with the plaintiffs. (*Crary v. Union Water Company*, 25 Cal. 504.)

Vanclef & Gear, for Respondent.

By the Court, CURREY, J.

The plaintiff, composing a joint stock company, under the name and style of the “American Company,” brought its action in June, 1863, against the defendants, alleging in its complaint that for more than ten years then last past it had been the owner and in possession of a certain ditch called the “Deadwood Ditch,” leading and extending and conducting the waters from Deadwood Creek, in Sierra County, to Craig’s Flat and Morristown, in the same county, for mining purposes. The plaintiff alleged that by means of the ditch and a dam at the head of it across the creek, it had, during the period named, except when wrongfully prevented by the defendants, diverted, as it lawfully might, from the creek, at the dam, sufficient of its waters to fill the ditch, which quantity of water had been, during all such period, appropriated and used by the plaintiff for mining purposes; and further alleged that plaintiff was still entitled to the rights which the company had so acquired.

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The rights and property thus acquired, the plaintiff alleged, had been obstructed by the defendants, who had from time to time, without right, entered upon the ditch and dam, and upon the creek above the dam, and by ditches, sluices and dams of their construction, diverted large quantities of the waters of the creek from the ditch, by reason of which a sufficient quantity of water to fill the plaintiff's ditch could not and did not flow through it, whereby the plaintiff had sustained damage in a sum specified. The plaintiff also alleged a threatened continuance by the defendants of the wrongs of which they complain, and they show by allegations that remedies at law were inadequate for the redress of the injuries threatened, and then pray for judgment for damages and for an injunction restraining the defendants pending the suit, and that such injunction might, on the final determination of the case, be made perpetual.

All the defendants but one appeared and answered. They first admitted that plaintiff owned the ditch described, and then denied that plaintiff was at any time entitled to so much of the water of the creek as would fill its ditch, except when there was sufficient in the creek for that purpose after supplying the defendants' mining claims below the dam. The defendants also denied that during "the whole" of the period of ten years the plaintiff had diverted as much of the waters of the creek as would fill its ditch, or ever was entitled to divert therefrom that quantity, except when a surplus sufficient therefor remained after the defendants were supplied. The defendants further denied that they or either of them at any time "wrongfully, injuriously or unlawfully," diverted or turned any water of the creek out of or from the ditch, and in the same connection they denied that any water by them at any time diverted from the creek of right ought to have flowed into or through plaintiff's ditch, and in conclusion they denied that the plaintiff had sustained any damage by the acts of the defendants.

For an affirmative defense, the defendants answered that long prior to the location of the plaintiff's ditch and dam,

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certain mining claims were located and worked in the bed and banks of Deadwood Creek, by persons from whom the defendants have derived their right and title whereby the defendants' grantors became and were entitled to the use and possession of all the waters of the creek, or so much thereof as might become necessary to the working of these mining claims, as the prior appropriators of the waters of the creek. And they also averred that the waters diverted by them from Deadwood Creek naturally flowed down its bed upon defendants' mining claims until wrongfully obstructed and diverted by the plaintiff, and that the same were necessary to the working of such mining claims.

A preliminary injunction was granted in the case, and when the cause was tried a judgment was rendered for the plaintiff, and the injunction was made perpetual. The appeal is from the judgment and from an order of the Court overruling a motion made by the defendants for a new trial.

The questions of fact in issue between the parties were tried by a jury. At the trial the defendants requested the Court to instruct the jury to find specially in respect to certain facts. This the Court refused to do, but submitted to them the following questions, with directions to respond to them in writing:

First—Is plaintiff entitled to all the waters of Deadwood Creek at the point where the same is diverted by its ditch?

Second—Are defendants entitled to any portion of the waters of Deadwood Creek which rise above the dam of plaintiff, and if they are so entitled, to how much and at what times?

The Court also directed the jury to return a general verdict, and to fix the amount of damages if their verdict should be for the plaintiff.

The defendants excepted to the Court's refusal to submit to the jury the questions of fact propounded on their behalf, and also to the submission of the two propositions set forth and to the direction to the jury to fix the amount of damages in case their verdict should be for the plaintiff.

The jury rendered a general verdict for the plaintiff and assessed the damages at three hundred dollars, and to the first

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question they answered: "That plaintiff is entitled to all the waters of Deadwood Creek at the point where the same is diverted by its ditch," and to the second question they answered: "That defendants are not entitled to any portion of the waters of Deadwood Creek which rise above the dam of plaintiff."

The one hundred and seventy-fourth section of the Practice Act defines the nature and character of a general verdict, and also of a special verdict; and the next section provides that in an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. But in all other cases, the Court may direct the jury to find a special verdict upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon.

It is the Court's province to determine as to what particular facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question to the jury, and for refusing to comply with such a request no error can properly be assigned.

At the request of the plaintiff, the Court gave to the jury certain instructions, which it is not necessary to notice in detail. The instructions so given are, in our judgment, a just exposition of the law on the subjects to which they relate.

The defendants on their part requested the Court to instruct the jury to the effect that if they believed from the evidence that the ditch was located before the defendants' mining claims, and that plaintiff had a good title to the waters of the creek above the dam, and had never entered into any agreement as to the quantity of water to be used by each of the parties, but also still believed from the evidence that the defendants had used a portion of the waters adversely to the plaintiff for more than five years before the commencement of the action, that then, to the extent of the water so used by the defendants, the jury should find in their favor. The Court refused to so instruct the jury, and the defendants excepted.

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The instruction requested proceeds upon the theory that the plaintiff acquired by prior appropriation of the waters of the creek a property therein of which it could not be divested otherwise than by a grant or by operation of law; and assuming this, the defendants claimed that by their adverse use and enjoyment of a portion of the waters of the stream for the period stated, the presumption had arisen that they had derived from the plaintiff by grant the right to the use of the water to the extent which they had during such period used the stream.

The general and established doctrine is that an exclusive and uninterrupted enjoyment of water, in any particular way, for a period corresponding to the time limited by statute within which an action must be commenced for the recovery of the property or of the assumed right held and enjoyed adversely, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person which might have been, but was not asserted. (3 Kent's Com. 441 to 446; *Bealey v. Shaw*, 6 East, 214; *Shaw v. Crawford*, 10 John. 236; *Johns v. Stevens*, 3 Vermont, 316; *Union Water Co. v. Crary*, 25 Cal. 504.)

The right which the defendants claim under the grant, which they assumed to exist, as evidenced by their adverse use and enjoyment of the water for five years, they denominate an easement. An easement or servitude may be created by grant or prescription, and when created it will pass by conveyance with the dominant estate (that is, with the estate to which it is appurtenant, as an incorporeal hereditament) attached to the servient estate, subjecting the latter to the benefit of the former. But the owner of the easement or servitude has no general property in nor seizin of the servient estate, though he may, by holding a fee in the dominant estate, have an estate of inheritance in the easement or servitude. (Wash. on Easements and Servitudes, Ch. 1, Sec. 1; Ersk. Inst. 352; *Wolf v. Frost*, 4 Sand. Ch. R. 89.)

A grant of an estate in lands, whether corporeal or incorporeal, may be presumed from an adverse enjoyment for the

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period corresponding to the Statute of Limitations within which an action might have been maintained against the person holding and enjoying adversely. But what must be the circumstances under which such presumption may arise? In order that the enjoyment of an easement in another's land may be conclusive of the right claimed, it must have been *adverse* in the legal sense of the term; that is, the right must have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted. The burden of proving this is on the party claiming the easement. If he leaves it doubtful whether the enjoyment was adverse, known to the owner and uninterrupted, it is not conclusive in his favor. (2 Greenleaf's Ev. Sec. 539; Greenleaf's Cruise, Tit. 31, Ch. 1, note 1 to Sec. 21, and cases therein cited.)

According to the common law system of pleading a defendant could not give in evidence under the general issue, in excuse or justification of an alleged trespass, a right of common, or a public or private right of way or a right to an easement, nor any interest in land short of property or right of possession. (*Saunders v. Wilson*, 15 Wend. 338; *Babcock v. Lamb*, 1 Cow. 239; *Rouse v. Bardin*, 1 Hen. Black. 352; 2 Saund. Pl. and Ev. 856; 1 Chitty Pl. 505.) A defense of the kind mentioned had to be pleaded specially. The reason of the rule was to prevent surprise. (*Demick v. Chapman*, 11 John. 132.)

The rule of the common law here referred to has not been changed so as to obviate the necessity of pleading specially such defense. By the law of this State the defendants were bound to interpose their alleged right by answer as well as by evidence, provided it be conceded that plaintiff had the prior right and title to the waters of the creek, as the requested instructions assumed as the predicate for the presumption that a grant of a portion of the waters had been made to the defendants. This defense was, within the language of the forty-sixth section of the Practice Act, *new matter*, which it was necessary to plead in order to become available for the defendants. (*McKyring v. Bull*, 16 N. Y. 307.) The defend-

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ants having failed to tender by answer an issue as to their right to a portion of the water as an easement or servitude derived from the plaintiff by grant to be presumed from an adverse user and enjoyment of it for five years, the Court properly refused to instruct the jury as requested.

But the requested instruction was properly refused on another ground. All the conditions on which a grant may be presumed were not stated. The defendants may have used a portion of the waters to which the plaintiff was of right entitled, adversely to the company for five years before the action was commenced, but still without the knowledge or acquiescence of the plaintiff, and not without interruption. If the jury had been instructed as requested it would have been erroneous, aside from the objection that the defense was not pleaded, because an adverse use and enjoyment may have been interrupted or may have been without the knowledge and acquiescence of the plaintiff, in either of which events no presumption of a grant could have arisen. (Wash. on Easements and Servitudes, 86.)

The remaining alleged error is, that the decree in the case goes beyond the relief sought by the complaint. By the complaint the plaintiff makes no claim of right to the waters of the creek beyond an amount sufficient to fill its ditch; and the wrongful acts of the defendants, of which the plaintiff complains, are limited to an invasion of its right to the water to the extent stated. The creek may furnish an amount of water in excess of the quantity necessary to fill the ditch, to which the plaintiff has no right but to which the defendants may be entitled as the owners of mining claims on the stream below the dam. The decree of the Court forever enjoins and restrains the defendants from diverting any water from or in any manner interfering with the waters of the creek that rise above the plaintiff's dam, and from diverting any of the waters of the creek that would otherwise flow into and through the ditch, and from in any manner interfering with the plaintiff's ditch and dam.

The decree enjoining the defendants against interference

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with the waters of the creek which rise above the dam, we understand to mean, as the language fairly imports, not to prohibit the use and enjoyment by the defendants of the waters of the creek which may remain and flow down the creek after the plaintiff's ditch is supplied with the quantity necessary to fill it, but to prevent them from interfering with the water above the dam or disturbing the plaintiff's right to a quantity sufficient to fill and supply the ditch; as to the surplus, it does not appear the plaintiff has the right to detain or divert it from the defendants.

Judgment affirmed.

TOWNSEND BAGLEY v. GEORGE R. WARD, AND
FREDERICK MEBIUS.

LIEN OF A JUSTICE'S JUDGMENT ON REAL ESTATE.—A judgment rendered by a Justice of the Peace does not become a lien on the real estate of the judgment debtor until a copy of the judgment, certified by the Justice, has been recorded in the office of the County Recorder.

RECORDING OF DOCKET ENTRIES OF A JUSTICE.—The filing and recording in the Recorder's office of the copies of docket entries made by a Justice of the Peace, does not constitute the judgment a lien on the real estate of the judgment debtor.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Plaintiff recovered judgment, and defendants appealed.
The other facts are stated in the opinion of the Court.

Stanley & Hayes, for Appellants.

The alleged transcripts do not themselves profess to be "a transcript of the judgment;" they are certified to be "a true and correct transcript of the judgment *docket*." A Justice of the Peace has no authority by law to keep a book denominated a "judgment docket;" the only book he is authorized to keep is one called a "docket," and the statute specifies in detail what entries are to be made in it. (Practice Act, Sec.

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604.) None of these entries correspond with the alleged transcripts.

G. F. & W. H. Sharp, for Respondent.

By the Court, RHODES, J.

This is an action of ejectment to recover the undivided half of a lot in San Francisco. The complaint is in the usual form, and the answer denies most of the material allegations of the complaint, and sets up title in the lessor of one of the defendants, but the parties have narrowed the issues by their stipulation made August 30, 1860, by which it was agreed "that on the 5th of November, 1855, Sanders and Brenham owned and possessed one equal undivided half of hundred vara lot Number Two Hundred and Fifty-Three. That plaintiff claims to have Sanders' and Brenham's title to said undivided half of said lot under attachments and judgment sales against Sanders and Brenham, and not otherwise; and said defendant claims to have Sanders' and Brenham's title to said undivided half of said lot under attachments and judgment sales against said Sanders and Brenham, and not otherwise; and that the sole issue to be tried herein is— which party to this suit has succeeded to the title of Sanders and Brenham?"

The plaintiff introduced in evidence two judgments against Sanders and Brenham, rendered January 14, 1856, by a Justice of the Peace, under each of which the premises were sold January 20, 1858; also a judgment in the case of *Center v. Sanders and Brenham*, rendered by the District Court, January 25, 1856; under which the plaintiff redeemed the premises from the sales made under the Justice's judgments. A Sheriff's deed was executed to the plaintiff as such redemptioner, October 19, 1858.

The plaintiff, in order to show that the *Center* judgment was a lien on the premises, subsequent to that of the two judgments rendered by the Justice of the Peace, introduced in evidence copies of the record in the County Recorder's

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office, which were copies of original papers filed and recorded therein as transcripts of the judgment docket of the Justice of the Peace, of the two judgments rendered by him, the transcripts being in form quite similar to the docket entries required to be made in the judgment dockets kept by County Clerks of judgments rendered in the District Court, but they were *not copies* of the judgments of the Justice of the Peace. The defendants objected to the admission of the Recorder's copies of the Justice's docket entries on several grounds, and among others that they were not transcripts of the judgments which were required by law to be filed in the Recorder's office, to constitute liens upon the real estate of the judgment debtor, but the Court overruled the objections. We consider the objection well taken. The law does not recognize a Justice's judgment docket for any purpose, and in order to create a lien upon the real estate of the judgment debtor, a transcript of the judgment — which is a copy of the judgment — certified by the Justice, must be filed and recorded in the County Recorder's office. (Practice Act, Sec. 599.) The filing and recording in the Recorder's office of the copies of the Justice's judgment docket entries did not constitute the judgment a lien on the real estate of Sanders and Brenham. It follows, therefore, that the Center judgment was not a lien upon the premises, subsequent to that of the judgments rendered by the Justice of the Peace, and that the holder of the Center judgment was not a redemptioner from the sales made under the Justice's judgments. (Practice Act, Sec. 230.) The deed executed by the Sheriff to the plaintiff as such redemptioner was without authority of law and is void.

It appears from the statement that the Court found for the plaintiff on the ground that the filing in the Recorder's office of the copies of the Justice's judgment docket created a lien upon the premises, and it is therefore improper for us to attempt to ascertain whether the remaining evidence introduced by the plaintiff was sufficient to have authorized the

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Court to find for the plaintiff, for it is the province of the Court below to find the facts in the case.

Judgment reversed and cause remanded for a new trial.

Mr. Justice CURREY expressed no opinion.

WILLIAM A. ELGIN v. JAMES HILL.

DATE OF CERTIFICATE TO DEPOSITION.—If, at the end of a deposition taken by a Commissioner out of the State, there is a *jurat* giving the date when the deposition was subscribed and sworn to, it is not necessary that the further certificate of a compliance with the four hundred and thirtieth section of the Practice Act should be dated.

DEPOSITION TAKEN BY STIPULATION.—If the parties stipulate that a Commissioner may take a deposition upon written interrogatories, and the stipulation says nothing about the day the same may be taken by the Commissioner, it is not necessary that the Commissioner state in his certificate the day the same was taken.

INTERESTED WITNESS.—One whose interest is equally balanced between plaintiff and defendant is a competent witness.

PURCHASE OF NOTE PAST DUE.—One who purchases a promissory note past due, but which has been paid before the purchase, takes it subject to the defense of payment, even if he was ignorant at the time of his purchase that it had been paid.

APPEAL from the District Court, Seventh Judicial District, Napa County.

The deposition spoken of in the opinion was taken in the Territory of Nevada by a Commissioner for this State, pursuant to the following stipulation:

“It is hereby stipulated and agreed, by and between the parties hereto, that the deposition of Wm. H. James, a resident of Nevada Territory, be taken in answer to the interrogatories, direct and cross, hereto attached, before some person authorized to take depositions, subject to all legal objections and exceptions, except as hereby waived. Notice, order, commission and channel of conveyance are not required to be in accordance with statutory provisions, and all objections to any

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omission, informality or irregularity in those regards, are hereby waived.

"Feb. 16th, 1864.

WHITMAN & WELLS, for Plaintiff.

"WALLACE & RAYLE,

"Attorneys for Defendant."

The suit was brought on a promissory note given by defendant Hill to one William Hudson or order, at Napa Valley, on the first day of April, 1859, payable on the 15th day of April, 1859.

The complaint averred the endorsement of the note by Hudson, and that plaintiff Elgin was the owner and holder. The action was commenced September 8th, 1862.

The answer averred that the note was paid by the defendant after it became due, and before plaintiff received it.

The deposition of James tended to show, that after Hudson had received Hill's note, the two firms of W. H. James & Co. and L. H. Murray & Co., who were doing business as merchants in Napa County, purchased the same from Hudson, and gave him their note in exchange therefor, and that afterwards, and about April, 1860, and while the firms still owned the note, Hill paid W. H. James & Co. the full amount due on the note, and that Hill asked to have his note delivered up, but James told him it was at the store of L. H. Murray & Co., and he would get it. Elgin, the plaintiff, afterwards received the note from Murray.

Defendant recovered judgment, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

Whitman & Wells, for Appellant.

Wallace & Rayle, for Respondent.

By the Court, SANDERSON, C. J.

The Court below did not err in admitting the deposition of W. H. James. The omission of the Commissioner before whom it was taken to append a date to his final certificate, was of

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no consequence. At the end of the deposition there is a certificate signed by the Commissioner, in the ordinary form to the effect that the deposition was sworn to and subscribed by the witness on the 5th day of March, 1863. Then follows immediately thereafter, without further date, a further certificate as to a compliance with the provisions of the four hundred and thirtieth section of the Practice Act, which directs the Commissioner to read the deposition to the witness, in order that he may have an opportunity to correct it if any mistake has been made. The two are to be read together, and if it was important to have the date at which the deposition was taken appear, it is clearly and sufficiently shown by the first certificate, and a repetition of the date in the last was wholly unnecessary. But, independent of the foregoing, the date was a matter of no consequence. The deposition, as appears upon its face, was taken pursuant to settled interrogatories direct and cross, and a stipulation between the parties annexed thereto, in which there is no mention of any date at which the same should be taken. The date, doubtless, was designedly omitted, in order that the deposition might be taken at such time as might suit the convenience of the witness and the Commissioner. Such being the case, we are unable to perceive how the date could have been of any consequence to either party, or how its absence from the certificate, had such been the fact, could affect any question as to the admissibility of the deposition.

Nor was the witness James incompetent on the ground of interest. As we understand the evidence the plaintiff received the note in suit in payment of a debt due to him from the firms of W. H. James & Co. and L. H. Murray & Co., of both of which the witness was a member. His interest, therefore, if he had any, was equally balanced between the plaintiff and defendant. If his testimony tended to discharge him from liability to the defendant, it also tended to charge him with liability to the plaintiff, and *vice versa*.

The deposition of James being in, the correctness of the verdict does not admit of debate. The jury could not have

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found otherwise without a total disregard of the evidence. The note was paid long before it came into the hands of the plaintiff, and there can be but little doubt but that he knew it had been paid when he received it. But, be that as it may, the note was long past due when he became the holder, and he therefore took it subject to all existing defenses.

The exceptions to some of the instructions upon the ground that they were irrelevant and calculated to mislead the jury, are not well taken.

Judgment affirmed.

BRIDGET McEVOY v. JAMES IGO.

COMPLAINT IN FORCIBLE ENTRY AND DETAINER.—A complaint in an action under the Forcible Entry and Detainer Act, other than actions against tenants holding over as provided in said Act, does not state facts sufficient to constitute a cause of action, unless it allege a forcible entry or a forcible detainer.

APPEAL from the County Court, City and County of San Francisco.

Plaintiff recovered judgment, and defendant appealed.
The other facts are stated in the opinion of the Court.

William M. Pierson, for Appellant.

Gardner & Woodson, for Respondent.

By the Court, SAWYER, J.

The complaint in this case does not state facts sufficient to entitle plaintiff to recover in an action under the Forcible Entry and Detainer Act. If plaintiff is entitled to recover in this action on the evidence introduced, it is on the ground, that, there was a forcible entry, or a forcible detainer after an unlawful entry, or both. The evidence was, perhaps, sufficient to show a forcible entry within the principle of *Minturn v. Burr*. 16 Cal. 107, and 20 Cal. 49, but no force, either in the

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entry, or detainer, is alleged. After stating possession of the land, the complaint proceeds as follows: "Plaintiff further alleges, that, being so in quiet and peaceable possession of said described premises, and entitled to the possession of the same, the said defendant, on or about the 25th day of February, 1863, unlawfully entered upon the said described premises, and took possession of the same, and the said defendant has ever since illegally and unlawfully detained possession of the same from the plaintiff against the form of the statute in such case made and provided, to her great damage, to wit, the sum of fifty dollars." This is the entire averment with respect to the character of the entry and detainer. The facts alleged are sufficient to authorize a recovery in the action formerly denominated ejectment—nothing more. It is unnecessary to add, that neither a Justice of the Peace, nor the County Court on appeal, has jurisdiction in such an action.

Judgment reversed and cause remanded.

GEORGE T. CROWTHER v. THOMAS ROWLANDSON,
AND ELIZA J. D. ROWLANDSON.

PROOF OF INSANITY.—Proof that at the time a grantor delivered a conveyance of property to the grantee, he was incapacitated from taking a rational care of his property by reason of mental delusion, is sufficient to justify a Court in setting aside the conveyance on the ground of the insanity of the grantor. A total loss of understanding is evidence of an imbecile rather than of an insane mind.

LIMITATION OF ACTION TO SET ASIDE DEED OF INSANE MAN.—If a person, while insane, is fraudulently induced to execute a conveyance of his property to another, the Statute of Limitations will not commence running against the grantor's right to commence an action to set aside the deed, until he recovers his reason and discovers what he has done.

MOTION FOR NEW TRIAL AFTER REFERENCE.—If, after the Court has filed its findings of fact, and made an order sending the case to a referee to take and state an account, a motion is made for a new trial, the motion will not stay the proceedings pending before the referee.

WHEN NOTICE TO MOVE FOR NEW TRIAL SHOULD BE GIVEN.—If the case is tried by the Court, and findings of fact are made and filed, and the case is then sent to a referee to take and state an account, the necessary steps to apply for a new trial should not be taken until the final report of the referee is filed.

STATEMENT MUST SPECIFY ERROR.—On appeal from an order denying a new

Statement of Facts.

trial, the appellate Court will not entertain an objection, however well founded, unless it is specified as an error in the statement.

TAKING AN ACCOUNT BY A REFEREE.—If a conveyance is set aside at the suit of the grantor, because of his insanity at the time of its delivery, the account taken under the decree should include such property only as passed into the hands of the grantee under the transfer.

ESTOPPEL IN RELATION TO DEPOSITION.—If a commission to take the deposition of a witness out of this State is issued, on the application of one party without the consent of the other, to a person who is not a Judge, or Justice of the Peace, or a Commissioner appointed by the Governor of this State, and the party who does not consent, after the appointment, files cross interrogatories, and stipulates as to the manner in which the deposition shall be returned, he is estopped from saying that the Commissioner was improperly appointed.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The complaint in this case sets forth substantially that the plaintiff, after a residence of some years in the City of San Francisco, was, on the 15th of April, 1856, possessed of real and personal property to the amount of about forty thousand dollars. That the defendant, Eliza J. D. Rowlandson, is the sister of the plaintiff, and the defendant, Thomas Rowlandson, her husband. That the defendants emigrated from England to California, and arrived in San Francisco about the first of March, 1856; that they were poor when they left England, and when they arrived in San Francisco were destitute of means; that when they arrived the plaintiff was in ill health, which affected his mind, and that he, soon after their arrival, became insane; that while in this condition the defendants instigated him to embark in the steamship for New York, on the 21st of April, 1856; that he reached the East in that situation, and did not recover so as to be fit for business for a period of two and a half to three years from that time; that he returned to San Francisco in November, 1860; that at the time he left, his property consisted: First—Of the stock in a store carried on by him in San Francisco, with a lease of the same, amounting in all to about ten thousand dollars in value, and bills receivable amounting to about fifteen thousand dollars. Second—A piece of land at San Francisco, near Mission

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Dolores. Third — A house and improvements on Sutter street. Fourth — Some articles of household furniture.

The plaintiff avers that a bill of sale of the stock, or first item mentioned, was executed by him, while he was insane, to Thomas Rowlandson a few days before he left, or on the day he left; that on the same day he executed a deed of the land near Mission Dolores, the second piece of property above mentioned, to the other defendant, Eliza J. D. Rowlandson, and also the bill of sale of the house and improvements on Sutter street, and of the articles of household furniture, being the third and fourth pieces of property above mentioned.

He further states that no consideration was paid for those instruments; that he was insane when they were executed; that the defendant knew him to be then insane, and fraudulently procured him to execute those instruments, and when he left took possession of the property.

The consideration expressed on the face of those instruments is as follows, viz:

In the bill of sale to the defendant, Thomas Rowlandson, of the stock in trade, five thousand dollars. In the bill of sale to Mrs. Rowlandson of house and improvements on Sutter street, and the furniture, one thousand dollars, and in the deed of the real estate near Mission Dolores, to Mrs. Rowlandson, one dollar.

The complaint prays that those instruments be declared null and void; that the defendants be adjudged to reconvey the property thereby granted or transferred, and that they account for all moneys received by them for the rents, and from the personal property.

The answer of the defendants denies their pecuniary inability in England, or their want of means on their arrival in San Francisco. They deny the alleged insanity of the plaintiff at the time of the execution of the several instruments; they aver that the bill of sale of the house and improvements was executed on the 15th August, 1855, instead of the 15th April, 1856, and was delivered to defendant, Mrs. Rowlandson, immediately on her arrival. The consideration for the sale

Argument for Appellants.

of the stock is particularly set out, and they deny that the several instruments were executed without any consideration; they deny that the plaintiff became insane before he left San Francisco, and that instead of inducing him to leave, he went away against their urgent request and remonstrance. It is also alleged that the plaintiff recovered the entire use of his reason in 1857, and they plead the Statute of Limitations, the action not having been commenced till the 2d October, 1861, more than three years from the time of his recovery.

A replication was filed in which plaintiff admits that he made a mistake in the complaint as to the date of the bill of sale of the house and furniture to Mrs. Rowlandson, but he denies on his information and belief that it was delivered to her immediately on her arrival at San Francisco.

The other facts are stated in the opinion of the Court.

P. G. Buchan, for Appellants.

The law on the question of insanity or mental imbecility affecting civil contracts, is well settled.

No degree of physical or mental imbecility which does not deprive one of legal competency to act is of itself sufficient to avoid a contract. (*Farnham v. Brooks*, 9 Pick. 212.)

A contract with a man of weak mind is binding, if no fraud or undue advantage is taken of his situation. (*Somes v. Skinner*, 16 Mass. 358.)

In order to avoid a deed, an entire loss of the understanding must be shown. Proof of a weak or impaired mind, or a want of understanding on some occasion only, is not enough. (*Person v. Warren*, 14 Barb. N. Y. 458; *Jackson v. King*, 21 Cowen, 207; *Petrie v. Shoemaker*, 24 Wend. 45.)

Mere imbecility is not sufficient. (*Blanchard v. Nestle*, 3 Denio, 37; see also the celebrated Parrish case in the 25th New York Reports, recently published, where the whole doctrine is fully discussed.)

Hoge & Wilson, for Respondent, referred to Stock on Non

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Compos Mentis, 25 Law Lib. 1-12; and Shelford on Lunacy, 1-49; and Halsam on Madness, 41, 42.)

By the Court, SHAFTEE, J.

The plaintiff executed to his sister, Mrs. Rowlandson, a deed of a lot situate near the Mission Dolores, in the City and County of San Francisco, and a bill of sale of a house, and other improvements, on a lot on Sutter street, including also certain household furniture. The conveyance bears date April 15, 1856, and the bill of sale, August 15, 1855, but both were acknowledged on the same day, viz: April 15, 1856. The plaintiff also sold to Thomas Rowlandson, at or about the same date, a warehouse situate on Leidesdorff street, together with the plaintiff's stock in trade therein, and assigned to Rowlandson the lease of the lot on which the warehouse stood, and the good will of the plaintiff's business as a wholesale and retail liquor merchant, and certain book debts and bills receivable—all of the aggregate value of twenty-five thousand dollars. The plaintiff left for the East by the steamer of April 21, 1856, and Rowlandson on that day took possession of all and singular the property before named, and proceeded in the conduct of the liquor business, and in the management of all the property, in his own name. The plaintiff returned to this State November 24, 1860, and on the 2d of October, 1861, commenced this action for the purpose of setting aside the conveyance, bills of sale and assignments aforesaid, on the ground that he was incapacitated by insanity from transacting business at the time the papers were executed. The answer denies the allegation of insanity, and sets up the Statute of Limitations in bar. The trial was by the Court, who found for the plaintiff on both issues. The defendants moved for a new trial, on the ground that the evidence did not justify the decision, and also on the ground of certain alleged errors of law occurring at the trial. A new trial was denied, and the defendants' appeal is from the order.

First—As to the sufficiency of the evidence to justify the

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finding that the plaintiff was insane at the time the conveyance and the other instruments were executed.

The appellants insist that there is no evidence in the case tending to prove that the plaintiff was insane at the time the execution of the papers was perfected by delivery; or if there was, still that the evidence on the other side was so overwhelming, as to justify the interposition of this Court under the rules by which its practice in such cases is governed.

The only point which we are here called upon to consider, is, whether there was a sensible conflict in the evidence bearing upon the question of insanity.

The counsel of the appellants is mistaken in supposing that the plaintiff's alleged insanity could be established only by proof that he was "entirely destitute of understanding." Loss of understanding would be proof of an imbecile rather than of an insane or disordered mind. Fatuity is one thing, and madness is another; and an answer to the larger part of the argument submitted for the appellants, is found in the fact, that the distinction between the two has been overlooked. To establish the insanity alleged, it was sufficient for the plaintiff to prove that at the time he delivered the instruments referred to, he was incapacitated from a rational care of his property by reason of mental delusion. (*Bond v. Bond*, 7 Allen, 1.)

It appears that sometime before the instruments in question were executed, the plaintiff became involved in lawsuits, which were pending on the 21st of April, 1856, the day on which he left for the East; and the purpose and drift of the plaintiff's evidence, was, to show that the merely natural concern awakened in his mind by the litigation, in the first instance, had, in the progress of events, taken on the form and impress of an insane fear that he was in danger of losing, or of being "robbed" of his property through the lawsuits so pending against him; and that under the influence of that delusion he transferred all of his property without consideration to his sister and her husband.

It may be true that Crowther, when he first conceived the purpose of transferring his property, was perfectly sane, and

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that he was also sane when he opened a sham account with Mrs. Rowlandson before her arrival here from England; still, if, as matter of fact, he finally executed the papers in question under the influence and ascendancy of the delusion named, it is enough. Though one of the instruments bears date August 15, 1855, and the others April 15, 1856, yet there was evidence introduced tending to prove that they were not in fact delivered until the 21st of that month—the day when they were all acknowledged. On that day, the plaintiff embarked for New York on board the steamer Sonora. A fellow passenger, who had known Crowther for some years, testified, that on the evening of the 21st, his conversation was rambling and incoherent, and was still more so the next day; that he talked about his troubles—asked the witness if “he thought they would rob him,” and said he “did not know but that they would ruin him.” He said he came away all of a sudden—talked about his lawsuits, was confused, and the witness thought he was drunk “because he talked so foolish.” There was no evidence that plaintiff drank anything on board, and none even that he ever indulged in the use of liquor. It further appeared, that on the third or fourth day out, the plaintiff “became a perfect maniac,” stripped himself of his clothing and attempted to jump overboard. After this he was kept in a close room until the arrival of the steamer at Panama. At Panama, Crowther was put in the custody of a man hired for the purpose by the Captain of the steamer, and was accompanied by him to New York and thence to his friends in the State of Maine. On his arrival there, he was placed by his friends in the Insane Asylum at Augusta.

We need not remark upon the tendency of this testimony, nor upon the question of its force. The particular facts which it discloses are recognized indications of insanity—the apparent inebriation being one of the most significant. (Shelford on Lunacy, pp. 49, 67.) And it is to be borne in mind that these indications were developed, and in a remarkable degree, on the very day when the instruments in question were executed, and but two or three days before the plaintiff became

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lunatic beyond question. Were there no other testimony than that which we have referred to, the motion for new trial would have to be denied. But there is other testimony tending to prove that Crowther was under the influence of the particular delusion referred to, at the time when the papers were delivered, and at least for some days before. It was in proof that Crowther was of a highly nervous temperament; that he had been in the charge of his physician for some twelve months before he left for the East; that "his disease was more mental than bodily;" that this mental disease increased gradually; that the disease threatened to terminate in lunacy, and might have been brought on by excitement at any moment; that a judgment for five thousand dollars in a slander suit had been recovered against him, and that he had been confined to his room for some ten days before he left for the East; that he was irritable, wakeful, and given to nightwalking; that "prior to his leaving he was in the most excited state of nervous irritability," and so much so that the defendant Rowlandson "dreaded the effect of the voyage, and opposed it, only ceasing to do so when he found that his staying might probably be productive of more injury than taking the voyage." Rowlandson, in a letter addressed to the superintendent of the Maine Asylum, says: "He (Crowther) was rapidly recovering before he left San Francisco, a relapse being occasioned by the excitement of a forthcoming trial." Crowther's physician testified that he "called on Crowther the day the boat was about to leave. Was sent for by Rowlandson, but came away without seeing him (Crowther). Was told by Rowlandson that Crowther was up stairs, very excitable, and it perhaps would be better not to see him. Heard him walking to and fro overhead." The testimony on the part of the plaintiff further tended to prove that Crowther was worth some forty thousand dollars, and was in good standing and credit as a merchant, and there was little or no proof that his apprehensions of ruin, as the result of his lawsuits, had any rational basis. The evidence of the plaintiff runs largely into detail, but the substance of it is contained in the foregoing summary. This tes-

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timony of the plaintiff, had, in our judgment, a manifest tendency to prove the insanity alleged. The evidence introduced by the defendants in support of their denial of the allegation of insanity, was very far from being destitute of weight, and if the Court had found the point against the plaintiff instead of for him, we could not have disturbed the judgment on the ground of a false finding.

Second — As to the defense of the Statute of Limitations.

The complaint not only alleges insanity on the part of the plaintiff, but contains allegations of fraud on the part of the defendants, and the replication meets the bar of the statute on the ground that the action was brought before the expiration of three years from the time when the fraud was discovered. We have examined the testimony bearing upon the question raised by the replication, and have considered the arguments of counsel. The evidence tends to prove that the plaintiff recovered his reason in February, 1857, and it is admitted that he returned to the State, November 24, 1860. Assuming that the plaintiff was insane at the time when the conveyance and bills of sale were executed, there can be no doubt that the point in controversy might well have been found in the plaintiff's favor on the ground of that fact alone. All, or some at least, of the instruments were recorded, but it cannot be inferred from that that the plaintiff was advised, before his return to the country, of what he had done while insane. Nor does it appear that either of the defendants, in the frequent letters written by them to Crowther, or his friends during his absence, made any disclosures on that subject. A power of attorney, executed by the plaintiff to Rowlandson at or about the 21st of April, 1856, is referred to in the correspondence, and the prominent idea, presented in all the letters, is, that Rowlandson was managing the property and business, as the agent of the plaintiff, to whom it still belonged, and to whom he held himself accountable. There was also evidence tending to prove that the defendants had availed themselves of the plaintiff's insanity to procure the execution of the instruments in question. The weight of this evidence was with the Court

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that tried the cause, and, under the settled practice of this Court, we cannot review its finding.

Third — The findings were filed March 19, 1863, and the case was referred to a Master to take and state an account. On the 30th of the same month, the defendants filed and served a notice of motion for a new trial. On the 27th of April following, the defendants moved for a stay of proceedings then pending before the referee, on the ground of the pendency of the motion for new trial. The motion was denied, and the denial is assigned for error.

By the one hundred and ninety-fifth section of the Act of 1863, it is provided that when "an action has been tried by the Court, or by a Commissioner or a referee," the party intending to move for a new trial shall give a written notice thereof within ten days after receiving written notice of the findings of the Judge, or the report of the Commissioner or referee. The issues in this case were tried in part by the Court and were in part committed for trial to a referee; and therefore, the case does not fall within either of the express allotments of the section. But it is apparent that the intention of the Legislature, was, that proceedings in new trials should be postponed until cases had been "tried." The trial of this case was not complete until the final report of the referee was filed. As the defendants renewed their notice of motion for new trial after the report was filed, and on a new statement, a decision of the point upon which we have just passed, is of no practical consequence, except, as it bears upon the regularity and effect of the referee's report as a proceeding in the case.

Fourth — It is objected that, on the evidence in the case, the plaintiff was entitled to an allowance of five hundred dollars only as advance to the defendants by Brown Brothers & Co., in New York. This objection cannot be entertained, however well founded it may be, for the reason that it is not specified as an error of fact in the statement on motion for new trial.

Fifth — As to the seven hundred dollars advanced by the plaintiff to the defendant Rowlandson before he left England

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for this country, it was improperly allowed. The only account that could be taken, in the theory of the action, was of the property which passed into the hands of the defendants under the transfer, or by virtue of the power of attorney, made by the plaintiff while insane.

Sixth—It is urged that the Court erred in overruling the objection taken to the deposition of J. W. Crowther.

We are satisfied that the transactions connected with the taking of the deposition preclude the defendants from saying that the Commissioner was not a person competent to take it. Cross interrogatories were filed after the order designating the Commissioner was made, and were, together with the interrogatories in chief, annexed to the commission. Subsequently the defendants stipulated that the commission "authorizing the Hon. George Evans to take the deposition of John W. Crowther, at the City of Portland, in the State of Maine, to be read in evidence on the trial of said action," should be returned by Wells & Fargo's Express. The defendants also obtained a stipulation from plaintiff's attorneys granting further time within which to file cross interrogatories, and themselves stipulated that the deposition might be opened by the plaintiff without prejudice to his right to read it in evidence at the trial of the action. The filing of the cross interrogatories after the Commissioner had been appointed, coupled with the first stipulation, in our judgment estopped the defendants from saying that the Commissioner was improperly appointed.

In the event that the plaintiff shall, within fifteen days, file with the Clerk of this Court a release of the personal judgment against the defendants of sixteen thousand seven hundred and ninety-nine dollars and forty-two cents, to the extent of seven hundred dollars parcel thereof, the judgment will stand as affirmed, otherwise the judgment is reversed and new trial granted.

And it is so ordered.

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Mr. Justice SAWYER being disqualified did not participate in the decision of this case.

By the Court, SHAFTEE, J., on petition for rehearing.

Motion for rehearing.

In the opinion filed in this action at the last term, we held there was evidence in the case tending to prove that the bill of sale of the house and improvements on Sutter street, though dated August 15, 1855, was not in fact delivered until the 21st of April, 1856. We so held under the impression that it appeared by the record that the instrument was in the hands of Crowther on the day named, and that he then personally appeared before a notary and acknowledged its execution. We were mistaken, in that particular, however. The bill of sale, instead of being acknowledged by Crowther, was proved before the notary by the attesting witness. A rehearing is granted, in so far as the question of the validity of said bill of sale is concerned, unless the plaintiff within fifteen days shall file with the Clerk of this Court a release fully discharging the property embraced in said bill of sale from the operation of the decree; whereupon the decree will be and stand as reversed in so far as it avoids and annuls said bill of sale, and will be and stand as affirmed as to the residue thereof, except in the particular wherein it has already been modified—the appellants to recover the costs of appeal.

And it is so ordered.

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In order to entitle a party to the relief sought in this case, upon the ground alleged, it must be made to appear, by satisfactory evidence, that he was, at the time of the execution and delivery of the several instruments sought to be cancelled, *non compos mentis*, within the legal meaning of those words. It is not sufficient to show a partial want of reason or understanding, for an entire and total absence must be shown in

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order to authorize the avoidance of a deed where there is no fraud apparent on the part of the grantee. In *Osterhout v. Shoemaker*, (reported in Note *a* to *Blanchard v. Nestle*, 3 Denio, 37,) Mr. Chief Justice Bronson said: "Our law does not distinguish between different degrees of intelligence. It does not deny to a man of a very feeble mind the right to make contracts and manage his own affairs. In the absence of fraud, proof of mere imbecility of mind in the grantor, however great it may be, will not avoid his deed. There must be a total want of understanding."

The legal presumption is that every man is *compos mentis*, and the burden of proof that he is *non compos mentis* rests on the party who alleges it. Unless, therefore, it appears from the testimony in the case that the plaintiff was a lunatic, or entirely deprived of his reason and understanding at the time the several instruments mentioned in the complaint were executed and delivered by him to the defendants, he has failed to sustain his action, for the charge of fraud is, in my judgment, without foundation in the evidence. It is agreed that all the evidence bearing upon the question is contained in the transcript.

The plaintiff alleges that his insanity commenced soon after the first of March, 1856, which was the date of the defendants' arrival in San Francisco. The bill of sale of the house and improvements on Sutter street to the defendant Mrs. Rowlandson was made on the 15th of August, 1855, more than six months prior to the alleged date of the plaintiff's insanity. The only testimony as to the delivery of this bill of sale is that of the defendant Thomas Rowlandson, who stated that the plaintiff delivered it to his wife at breakfast on the morning after their arrival in San Francisco, which was the second of March, 1856, and according to the plaintiff's own statement, prior to the date of his insanity. The other instruments were executed on the 15th of April, 1856, and acknowledged on the 21st of the same month, the latter being the same day on which the plaintiff sailed for New York.

The only witness examined by the plaintiff for the purpose

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of establishing his insanity at or prior to the 15th of April, was Dr. Mackintosh, who had known the plaintiff for about twelve years, and for several years prior to his departure for the Atlantic States in 1856 had been his attending physician. Dr. Mackintosh stated that he last saw the plaintiff in 1856, about fifteen days before his departure; that plaintiff had been confined to his bed about ten days some short time prior to his departure East; that his disease was more mental than bodily; that his symptoms were alarming, showing a tendency to insanity. Upon cross examination Dr. Mackintosh stated that he could not say that the plaintiff was *non compos mentis* during any portion of the time he saw or attended him; but on re-examination he testified that his condition was such that he might have become insane at any moment from any exciting cause; that any prostration in his business or change in his property might have brought on mental alienation. Dr. Mackintosh was examined not only as the plaintiff's attending physician, but as a medical expert. The most that can be claimed for his testimony is that it establishes a condition of health on the part of the plaintiff, at or about the time of his departure for the East, threatening future insanity upon any exciting cause affecting his business; but his testimony utterly fails to show that at any time prior to his departure the plaintiff had passed from sanity to insanity. If there is any other testimony than that of Dr. Mackintosh tending to establish insanity prior to the plaintiff's departure for the East, it has escaped my notice.

On the part of the defense, several witnesses were examined for the purpose of showing that up to that time the plaintiff was perfectly sane. Among them was Mr. Richards, the confidential clerk, bookkeeper and business man of the plaintiff, who drew the instruments in question, and Thibault, the notary who took the acknowledgments. Also, Clement Nixon, who was the plaintiff's barkeeper, and William McDonald, who was his drayman, and several others, who, as is shown, were on terms of intimacy with the plaintiff up to or within a short time of his departure, all of whom testified that they never

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saw anything in the plaintiff's manner or conduct indicative of insanity. It is true that the testimony of these witnesses is of a negative character, but in view of their long acquaintance with the plaintiff, and their means of observation and knowledge, it is entitled to great weight, especially when sustained by the evidence of a medical attendant who negatives the idea of present insanity. In this connection, it is well to call attention to the following note, written by the plaintiff four days after leaving San Francisco, and addressed to the steward of the steamship Sonora, on board of which the plaintiff sailed:

"MR. THOMAS HARRIS — Dear Sir: Should anything happen to me on this passage, you will please take charge of all my things and deliver them to my brother-in-law, Mr. Thomas Rowlandson, of San Francisco, on your return. He will pay you any charge you have on them. I send my best love to my dear sister and all the folks.

"I am, dear sir, yours truly,

"GEORGE T. CROWTHER.

"Friday morning, steamer Sonora, on her passage to Panama."

The plaintiff was certainly sane when he wrote this note, but seems to have had at that time a presentiment of the calamity which soon after befell him.

For the purpose of showing that the plaintiff was insane when he sailed from San Francisco, or became so soon after, Joseph H. Lyon, a fellow passenger, was examined on the part of the plaintiff, who testified to what are shown to have been symptoms of insanity, commencing with the day of his departure and continuing until the third or fourth day, at which time he became, in the language of the witness, "a perfect maniac." On the part of the defendants the purser of the ship, Mr. Goddard, was examined, who testified that he had been previously acquainted with the plaintiff. That he saw him on the second day out and two or three times a day thereafter until he became insane, and did not observe for the first

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five days of the voyage anything in the manner and appearance of the plaintiff different from what he had observed in his previous acquaintance with him. It was his impression that the ship was approaching the tropics, about five days after starting, before anything was discovered or appeared to be the matter with the plaintiff. According to the testimony of both these witnesses there was a cabin passenger by the name of Lazard on board who, according to Lyon, occupied a room adjoining that of the plaintiff, and according to Goddard a room in the same part of the ship. Lazard had a keeper and was very violent and noisy. As to the effect of going into a warm climate and a close proximity with a raving maniac upon a person having a tendency to insanity, Dr. Mackintosh was examined as an expert, and testified that these circumstances would have a tendency to produce an exaltation of the disease, and also to confirm it. Such is, in substance, all the testimony bearing upon the question of insanity except the fact that the instruments were executed without consideration.

The Court below found that the plaintiff conveyed the property in question to the defendants without any consideration, and I think that the finding in this respect is sustained by the evidence. The fact that a man has conveyed away, without consideration, all or nearly all of his property, unexplained, might afford ground to suspect his sanity, and if the other testimony in this case failed to explain the plaintiff's conduct in this respect, I should be strongly inclined to hold that the finding of the Court below was correct. It is very difficult, if not impossible, to show by testimony the precise point of time at which sanity ends and insanity begins; and where it is clearly shown, as in the present case, that insanity actually existed within a short time after the events alleged to have been produced by it occurred, we should be justified in holding that the actor was at the time insane, when his acts are contrary to human experience and can be explained upon no rational theory. But I think that the conveyance of nearly all of his property by the plaintiff to his sister and her husband can be explained upon a rational theory deducible from the

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evidence in the case, and that it can be shown that such theory is consistant with a sane, though not with an honest purpose, and that such conveyance, instead of being one of the effects of insanity, was a link in the chain of circumstances by which it was induced.

It appears from the evidence that at the time these conveyances were made there were several suits at law pending against the plaintiff for large amounts of money, one of which had already ripened into judgment for the sum of five thousand dollars and was standing on appeal. These suits were a source of constant annoyance and apprehension to the plaintiff and the staple of his thoughts and conversation. Suffering more or less from illness and the depression of spirits thereby induced it is not surprising that he should have regarded them, as he seems to have done, as threatening financial ruin. Nor is it altogether contrary to human experience to find him, under such circumstances, preparing to avoid the consequences of the coming storm in a manner in which neither law nor good morals can justify. It further appears, as we have already seen, that he commenced the work of transferring his property as early as August, 1855, by executing to his sister a bill of sale of the house and improvements on Sutter street, at a time when there is no pretense that he was insane, and without any consideration, as he himself alleges. And in January, 1856, he caused his bookkeeper to open an account with his sister, who had not yet arrived in the country, and from whom, according to his own account, he had never received a dollar, commencing with a credit of one thousand five hundred and thirty-seven dollars, cash loaned. He also bought a buggy for the sum of three hundred and fifty dollars in his sister's name; also, some property at the sale of the Folsom estate; all of which was done at a time long prior to the date at which he alleges he became insane. When his sister arrived, he delivered the bill of sale, and afterwards proceeded and fully executed the design which he seems to have formed six months previous, by conveying his real estate to his sister, and transferring his mercantile busi-

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ness, including stock in trade, to her husband, and soon after departed from the State. Bodily illness, care and anxiety on account of his business affairs, apprehension of ruinous results following from the pending lawsuits, in connection with the fear that he had placed himself too much in the power of his sister and her husband, soon thereafter resulted in temporary insanity.

This theory, that the plaintiff transferred his property to his sister and brother-in-law for the purpose of placing it beyond the reach of his creditors, is moreover fully sustained by letters written by Rowlandson to the brother of the plaintiff, residing in Maine, and introduced in evidence by the plaintiff. In those letters Rowlandson represents himself as carrying on the business for the plaintiff, and desires that the plaintiff may be assured that his affairs are not suffering in consequence of his absence. This language, used at a time when the pending controversies could not have been anticipated, is in perfect harmony with the view which I have taken of this transaction, but it is widely at variance with the theory upon which this action is sought to be maintained. Had Rowlandson fraudulently taken advantage of the plaintiff's alleged insanity for the purpose of robbing him of his estate, under the pretense of a purchase, he would not afterwards have spoken in letters to the brother of the plaintiff of the business and estate as being conducted and managed by him as the agent of the plaintiff and for his use and benefit.

Thus, the fact that the conveyances were made without consideration is explained by the testimony in the case, and shown to be consistent with the idea of sanity. Leaving this fact, therefore, out of view, the question of insanity is made to depend for its solution solely upon the testimony of Dr. Mackintosh, and Lyon, on the part of the plaintiff, and Goddard, Richards, Thibault, Nixon, McDonald and others, whose testimony was of a like character with that of the last four named, and the plaintiff's note to the ship's steward, on the part of the defendants. This testimony shows that the plaintiff became insane four or five days after he left San Francisco, but

Points decided.

in my judgment utterly fails to show that he was insane on the 15th of August, 1855, when he executed the bill of sale of the house on Sutter street, or on the 2d of March, 1856, when he delivered it to his sister, or on the 15th of April, 1856, when he executed the other papers, or on the 21st of the same month, when he acknowledged their execution. On the contrary, there is in this testimony no conflict, and it all tends to prove, if it proves anything, that the plaintiff at these several dates was sane, or at least that he was not *non compos mentis* within the legal meaning of those words.

Such being my views upon the controlling question involved in this case, I am compelled to dissent from the judgment pronounced by a majority of the Court.

I think the judgment should be reversed and a new trial ordered.

THE PEOPLE v. JAMES A. SHOTWELL.

DISCHARGE OF JURY IN CRIMINAL CASE.—If, after the jury in a criminal case have retired to deliberate on their verdict, the Court directs the Sheriff to discharge them if they do not agree on their verdict by a certain hour, and then adjourns, and at the hour named the Sheriff discharges the jury, this will not operate as an acquittal of the defendant, but another trial may be had.

CHARGE OF TWO OFFENSES IN INDICTMENT.—If an indictment for forgery contains two counts, in each of which a copy of the instrument alleged to have been forged is set out, and the copies are alike, it will not be presumed that each is a copy of only one and the same original instrument, without an allegation to that effect in the second count.

WHEN SEVERAL DISTINCT OFFENSES MAY CONSTITUTE A SINGLE CRIME.—A person guilty of forging a check, and also of an attempt to pass it, or of passing it as true and genuine with intent to damage and defraud another person, may be indicted, tried, and convicted for all these connected and consecutive acts as constituting one transaction and one crime; or if guilty of but one of such acts, he may be indicted, tried, and convicted for its commission as constituting a distinct crime.

HOW OBJECTION TO INDICTMENT TO BE TAKEN.—If there is more than one offense charged in the indictment, the defect should be taken advantage of by demurrer. If the objection be not taken by demurrer, it cannot be considered on motion in arrest of judgment.

ELECTION AS TO COUNT ON WHICH ACCUSED SHALL BE TRIED.—If the indictment contains more than one count, each charging a distinct offense, the Court is not required to compel the prosecutor to elect upon which count of the indictment he will try the accused.

Argument for Appellant.

SENTENCE WHERE INDICTMENT CHARGES TWO OFFENSES.— If the indictment contains more than one count, each charging a distinct offense, and the verdict is general, finding the defendant guilty, the presumption will be that the Judge who tried the case pronounced judgment for the offense to which the evidence was directed and was properly applicable.

APPEAL from the County Court, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. Vanarman, for Appellant.

The practice in criminal cases in California is very minutely regulated by statute, leaving very little scope for the operation of the common law in mere matters of practice.

A jury once charged with a criminal case shall not be discharged before verdict except for reasons specified in the statute, (Wood's Digest, Sec. 410, p. 302,) "unless by consent of both parties, entered in the minutes, or unless after such a time as the Court shall deem proper, it satisfactorily appear that there is no reasonable prospect of an agreement."

The reasons specified in said section are, in brief, inability from sickness or other inevitable accident. No such accident is here pretended, and the only question is whether the jury were discharged regularly on account of inability to agree.

"After such time as the Court shall deem proper, it must appear (to the Court) that there is no reasonable probability of an agreement."

The discretion here vested is given to the Court to decide whether there is a probability of agreement, not to the Sheriff or any other officer. It is a judicial discretion as much as any other required to be exercised in the course of the trial, and according to elementary principles, cannot be delegated or executed by proxy.

Suppose the Judge should leave the whole question of how long the jury should be kept together, and when it had become apparent that the jury could not agree, and should direct the Sheriff to keep the jury together until he was satisfied that they could not agree, and then discharge them. Would this

Argument for Respondent.

constitute a compliance with the law? The duties of the Sheriff and of the Judge cannot be thus confounded consistently with either law or the safety of the citizen.

The question of discharging or retaining the jury is a judicial question, and cannot be delegated or decided by proxy.

Hoge & Wilson, for the People.

It was originally doubted whether at common law, a jury, when once given in charge of a case, could be discharged by the Court without a verdict. But the dictum of Coke to the effect that the Court had no such power, has been long since overruled and held not to be law. And it is now settled, both in England and the United States, that the Courts may, in their discretion, discharge a jury without verdict, when satisfied that the proper administration of justice requires it. The whole doctrine rested upon the principle of the common law, that no man should be twice put in jeopardy of life or limb for the same offense. This principle of the common law has been made the subject of constitutional provision in our organic law as well as in that of the United States. It is at this day well settled, that the discharge of a jury in a criminal case, and putting the prisoner upon a second trial, is not a violation of the constitutional provision, is not a putting in jeopardy a second time, and does not entitle him to a discharge. It was at one time thought that a distinction existed between capital cases and other felonies, but that distinction has not been maintained, and the better authority sustains the power of the Court to discharge the jury for want of agreement, or other proper cause, without regard to the character or magnitude of the offense. As has been well said, to admit it in any case, or for any cause, is to yield the whole principle, and, of necessity, leave it discretionary with the Court when and under what circumstances the power should be exercised.

The Court will find the whole doctrine thoroughly discussed and settled in the following cases: *People v. Goodwin*, 18 John. 199, and fol.; *People v. Olcott*, 2 Johns. Cases, 301; *People v. Green*, 13 Wendell, 55; *United States v. Haskell*,

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4 Wash. C. C. 408, 410; *United States v. Perez*, 9 Wheaton, 579; *Commonwealth v. Bowden*, 9 Mass. 494; *Commonwealth v. Purchase*, 2 Pick, 521; *Commonwealth v. Roby*, 12 Pick. 496; *United States v. Shoemaker*, 2 McLean, 114; *Commonwealth v. Townsend*, 5 Allen, Mass. 216; *United States v. Coolidge*, 2 Gallison, 363; *People v. March*, 6 Cal. 546.

By the Court, CURREY, J.

The defendant was indicted for forgery, to which he pleaded not guilty. He was twice tried. At the first trial the jury disagreed and were discharged; on the second trial he was found guilty and sentenced to be imprisoned in the State Prison for the term of six years. The indictment consists of two counts. By the first count the defendant is accused with having on the 26th of January, 1864, at the City and County of San Francisco, in the State of California, feloniously and falsely forged and counterfeited a certain check—a copy of which is set forth in such count—with intent to prejudice and defraud the drawees therein named. The second count of the indictment charges that the defendant, on the same day and year, and at the same place, did feloniously and falsely attempt to pass, and did alter and pass, as true and genuine, a certain forged and counterfeit check—a copy of which is set forth in said second count, and is in the identical words and figures of that described in the first count—with intent, well knowing the same to be forged and counterfeit, then and thereby to prejudice, damage and defraud the drawees therein named.

The defendant relies on three grounds for a reversal of the judgment, as follows:

First—That the jury first impanelled to try the defendant were irregularly and illegally discharged.

Second—That the indictment charges against the defendant the commission of several distinct offenses, and that the Court refused to require the prosecution to elect on which charge to try him, though requested to make such order.

Third—That the verdict of the jury is general, convicting

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the defendant of several distinct offenses, while the evidence is confined to one of the charges.

We will examine these points in the order in which they are stated.

I. Upon the first trial the cause was finally submitted to the jury at four o'clock in the afternoon of the day when they retired, and, not having agreed upon a verdict at eleven o'clock in the night of the same day, the Court, in the absence of the defendant, but in the presence of one of his counsel, directed the Sheriff that in case the jury failed to agree by two o'clock of the following morning, then to discharge them. The jury not having agreed at that hour, they were discharged as directed. The defendant's counsel claims that this operated as an acquittal of the defendant. The course pursued in this particular is not to be commended. It was an irregularity, but it does not therefore follow that the effect of it was to acquit the defendant. The four hundred and eleventh section of the Criminal Practice Act reads as follows: "In all cases where a jury are discharged, or prevented from giving a verdict by reason of any accident or other cause, except when the defendant is discharged from the indictment during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term."

By subjecting the defendant to the trial at the time he was found guilty, it cannot be said he has been twice put in jeopardy for the same offense in violation of a constitutional right. On this point Courts have been often called upon to interfere for the protection of persons accused of crimes, where upon the first trial the jury has been discharged without having rendered a verdict. In the case of *The People against Goodwin*, 18 John. 187, the subject was ably and elaborately considered by Mr. Chief Justice Spencer, and the conclusion to which he arrived was that, where a jury in a criminal case is discharged without having found a verdict, the accused may be tried again by another jury, and that he is not thereby put in jeopardy the second time for the same offense. To the same effect are many other judgments of high authority.

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(*United States v. Shoemaker*, 2 McLean, 114; *United States v. Perez*, 9 Wheat. 517; *United States v. Haskell*, 4 Wash. C. C. R. 402; *People v. Olcott*, 2 John. Cas. 301; *Com. v. Purchase*, 2 Pick. 521; *Com. v. Roby*, 12 Pick. 496.)

In the case of *Com. v. Townsend*, 5 Allen, 216, the jury after having been out seven hours, were discharged in the absence of the Judge, as in this case, by the officer having them in charge, who acted by order of the Court; but the jury did not accept the discharge, but continued together and afterward found a verdict of guilty, sealed it up, and the next morning brought it into Court. The defendant moved to set it aside because it was made after the jury were discharged. The Court, in which the trial was, denied the motion, but on writ of error the Supreme Court of Massachusetts held that the verdict ought to have been set aside for the reason that before the jury agreed upon it they had been lawfully discharged from the consideration of the case. The Court in the case here cited say: "We do not doubt the authority of the Court in its discretion to make the order for the discharge of a jury after seven hours disagreement, yet a much preferable course would be to direct the officer, who had charge of them, that if they would not agree by a certain hour he should inquire of them whether they were likely to agree, and if told by them that they were not, then to discharge them." The authorities cited and the reasons on which they are founded, is a full answer to the defendant's objection and application for a discharge.

II. The seventy-third section of the Act concerning crimes and punishments (Laws 1850, p. 237) declares the forging or counterfeiting of a check for the payment of money by any person with intent to damage or defraud any person or persons, to constitute the crime of forgery. The same section also declares the uttering, publishing, passing, or attempting to pass as true and genuine a forged or counterfeit check by any person, knowing the same to be forged or counterfeited, with intent to prejudice, damage or defraud any person or persons, to constitute the crime of forgery also, and that the

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offender, upon conviction of the crime, shall be punished by imprisonment in the State Prison for a term not less than one nor more than fourteen years.

The defendant is accused by the indictment of having committed each of these distinct criminal acts, without showing that the check described in the first was the same as that described in the second count. But it would seem upon reading the second count of the indictment that the check which it is alleged that the defendant attempted to pass and did pass was a different check from the one described in the first count, for it is distinguished as the "last mentioned" check. It is not possible, from the face of the indictment, to say that the same check was intended to be described in both counts; and though the copies are alike *verbatim et literatim*, it is not to be presumed that each is a copy of only one and the same original instrument.

If it appeared from the indictment that the check described in the second count was the same as that described in the first, the objection that several offenses were charged in the indictment could not be maintained; for if the same person be guilty of making a forged or counterfeit check, and also of attempting to pass it, or of passing it (which involves the attempt), as true or genuine, with the intent to damage or defraud another, he might be indicted and tried for all these connected and consecutive acts as constituting one transaction, or he might be indicted and convicted for each distinct crime of which he might be proved to be guilty. The doctrine on this subject is laid down in Wharton's Criminal Law (141), as follows: "Where a statute makes two or more distinct acts, connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled, they may be coupled in one count. Thus setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table and inducing others to bet upon it, may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet, when both are perpetrated by the same per-

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son, at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted." (*Com. v. Eaton*, 15 Pick. 273; *Com. v. Tuck*, 20 Pick. 360; *Com. v. Hope*, 22 Pick. 1; *State v. Johnson*, 3 Hill's S. Car. R. 1; *Buck v. State*, 2 Harr. & John. 426; *State v. Coleman*, 5 Porter, 40; *Hinckley v. Com.*, 4 Dana, 518.)

The two hundred and forty-first section of our Criminal Practice Act provides that an indictment shall charge but one offense, but it may set forth that offense in different forms under different counts.

According to the common law the defendant could not properly be charged in the same count with two or more distinct offenses. (Wharton's Cr. Law, 139; *Com. v. Eaton*, 15 Pick. 274.) Such a defect would be fatal on motion to quash or on demurrer, but it is said the better opinion is that it would not be ground for arresting the judgment. (Wharton's Cr. Law, 141 and 683; *Commonwealth v. Tuck*, 20 Pick. 360-362.)

By the two hundred and eighty-ninth section of our criminal code of procedure it is provided that the defendant may demur to the indictment on various grounds appearing on the face of it, among which is "that more than one offense has been charged in the indictment." The two hundred and ninety-seventh section provides: "When the objections mentioned in section two hundred and eighty-nine appear upon the face of the indictment they can only be taken advantage of by demurrer, except that the objection to the jurisdiction of the Court over the subject of the indictment, or that the facts stated do not constitute a public offense, may be taken at the trial under the plea of not guilty, and in arrest of judgment." If this section is to have full force and effect, then the objection that the indictment charged the defendant with having committed several distinct offenses cannot be supported. He failed to demur and the statute says this objection so appearing on the face of the indictment can only be taken advantage of by demurrer.

But after verdict of guilty, the defendant may move in arrest of judgment; and the four hundred and forty-second sec-

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tion of the same Act provides in terms that such motion "may be founded on any of the defects in the indictment mentioned in section two hundred and eighty-nine." If to the language here employed the fullest effect be given, it necessarily works a complete abrogation of section two hundred and ninety-seven—a consequence which should be avoided, if consistent with legal rules of construction and interpretation. It is a familiar doctrine that an Act of the Legislature should be so construed and expounded as to give some effect, if possible, to every portion of it; and it is the duty of Courts, as far as practicable, so to reconcile the different provisions as to make the whole Act consistent and harmonious. (*Com. v. Duane*, 1 Binney, 601; *Com. v. Alger*, 7 Cush. 53 and 89; *Attorney-General v. Road Company*, 2 Mich. 138.) Every interpretation that leads to an absurdity ought to be rejected; or, in other words, a construction should not be put upon a statute from which an absurd consequence would follow. (Vattel B. 2, Ch. 17, Sec. 282; Smith's Com. Sec. 486.) It is not to be presumed that the Legislature intended that the two hundred and ninety-seventh section before quoted should prove of no effect, or practically a nullity. We repeat that where a particular interpretation would be attended with such a consequence, it should be rejected, and that construction adopted which, in consonance with the true office of interpretation, will avoid the entire sacrifice of one portion of the statute for the purpose of giving the broadest effect to another. (Smith's Com. Sections 487, 488.)

If the four hundred and forty-second section which provides that a motion in arrest of judgment may be founded on any of the defects of the indictment mentioned in section two hundred and eighty-nine, be read without any reference to section two hundred and ninety-seven, its language, it may be conceded, is comprehensive enough to embrace the objection made. But we are not at liberty to disregard the two hundred and ninety-seventh section of the Act, inasmuch as the four hundred and forty-second section may be interpreted as refer-

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ring only to the causes for arresting the judgment, which stand unaffected by section two hundred and ninety-seven.

The defendant having omitted to demur to the indictment for the defect objected to, it cannot properly be considered on motion in arrest of judgment.

The defendant also complains that the Court erred in refusing to compel the public prosecutor to elect upon which count of the indictment he would try the accused. If the Court has the right to require the election to be made, the exercise of the authority is a matter of discretion, (2 Russ. on Crimes, 774; *People v. Baker*, 3 Hill, 159,) and where it does not appear that the defendant sustained any injury by the ruling of the Court in this respect, it cannot be held erroneous. But under our statute it may be doubted whether the Court has the right to compel the prosecution to elect in such cases, because the statute is positive that the objection suggested can only be taken advantage of by demurrer.

III. The point is made that the verdict of the jury is general, convicting the defendant of several distinct offenses, while the evidence is confined to only one of the offenses charged.

In *Crowley v. Commonwealth* and *Kite v. Commonwealth*, 11 Metcalf, 575 and 581, Mr. Chief Justice Shaw holds that where an indictment charges in one count a breaking and entering a building with intent to steal, and in another count a stealing in the same building, on the same day, and the defendant is found guilty generally, the sentence, whether that which is proper for burglary only, or for burglary and larceny also, cannot be reversed on error, because the record does not show whether one offense only, or two, were proved on the trial; and as this must be known by the Judge who tried the case, the sentence will be presumed to have been according to the law that was applicable to the facts proved.

If the defendant was proved to be guilty of both offenses charged, he cannot justly complain of the judgment. If he was proved to be guilty of only one of them, it must be presumed the Judge who tried the case pronounced judgment

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against him as upon a verdict for the offense to which the evidence was directed and was properly applicable.

Judgment affirmed.

THE PEOPLE v. JUAN ANTONIO.

ACT CONCERNING INDIANS.—The Act of April 22d, 1850, for the protection and punishment of Indians, was intended to be applied to Indians in tribes, or when living in separate communities or companies, and not to a case where an Indian has been living among white men.

REPEAL OF ACT PRESCRIBING WHIPPING FOR LARCENY.—The Act of April 22d, 1850, conferring on Justices of the Peace the power to punish Indians convicted of larceny by whipping, is repealed by the Act of 1856, which prescribes the punishment for both grand and petit larceny.

JUSTICE'S JURISDICTION TO TRY INDIAN FOR GRAND LARCENY.—The Act of April 20th, 1863, concerning Courts of justice in this State, takes away from Justices of the Peace the power to try and punish Indians for grand larceny conferred upon them by the Act of April 22d, 1850, for the protection and punishment of Indians.

BURDEN OF PROVING HOW STOLEN PROPERTY WAS OBTAINED.—The burden of proving that stolen property found in his possession came honestly into his hands is not cast upon a defendant in a criminal case, unless the prosecution has introduced evidence, either direct or presumptive, sufficient to prove that he came dishonestly by it.

GENERAL OR SPECIAL VERDICT IN CRIMINAL CASES.—The Court cannot direct a jury, in a trial for larceny, to render a special verdict, but, upon the request of either party, it should instruct them that they have the discretion to render either a general or special verdict.

APPEAL from the County Court, Santa Cruz County.

The facts are stated in the opinion of the Court.

D. E. Allison, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, RHODES, J.

The defendant was indicted and convicted of grand larceny. It was admitted by the District Attorney and was proven that the defendant was an Indian.

The most important question in the case arises upon the

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refusal of the Court to give the jury the following instruction: "That the defendant cannot be convicted of larceny under the law as it is applied to Indians." The counsel for the defendant claims that the defendant, being an Indian, is liable to be prosecuted and punished for the offense charged against him, according to the provisions of an Act for the protection and punishment of Indians, passed April 22, 1850, and not under the general statutes concerning crimes and punishments. The Act of 1850 for the protection and punishment of Indians was, in our opinion, obviously intended to be applied to Indians in tribes, or when living in separate communities or companies, and not to a case where an Indian has been living, as in this case, for years among white men.

But if this view is incorrect, there are other reasons militating against the defendant's proposition.

The first section provides that "Justices of the Peace shall have jurisdiction in all cases of complaints by, for or against Indians, in their respective townships in this State," and the sixteenth section provides that "an Indian convicted of stealing horses, mules, cattle or any valuable thing, shall be subject to receive any number of lashes not exceeding twenty-five, or shall be subject to a fine not exceeding two hundred dollars, at the discretion of the Court or jury," and section seventeen gives the Justice the discretion to appoint a white man or an Indian to do the whipping in his presence.

The Attorney-General asks if the punishment prescribed is not "cruel and unusual," and therefore unconstitutional? We think it is liable to that objection, notwithstanding it is directed by the Act that the Justice "shall not permit unnecessary cruelty in the execution of the sentence."

Besides this, the Act of 1856, (Wood's Digest, 337,) defines both grand and petit larceny and prescribes the punishment to be inflicted upon conviction; and as the Act by its terms is applicable to all cases of larceny, it repeals by necessary implication previous Acts providing a different mode of punishment. The Act of April 20, 1863, concerning Courts of justice of this State organized under the amended Constitution,

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confers upon the County Courts jurisdiction to try ~~and~~ determine indictments for grand larceny, and does not confer upon Justices of the Peace jurisdiction in such cases, and thus in effect it takes from Justices of the Peace, whose powers it is provided in the Constitution "shall not in any case trench upon the jurisdiction of the several Courts of record," the jurisdiction of grand larceny attempted to be conferred upon them by the sixteenth section of the Act of 1850, for the protection and punishment of Indians.

^ The defendant also assigns as error the refusal of the Court to instruct the jury "that proof of possession of property recently stolen is not of itself sufficient evidence upon which to convict the prisoner of larceny." This instruction is marked "given," and the record shows that the Court instructed the jury that "if the horse was stolen and immediately after being stolen, was found in the possession of the prisoner, and the prisoner failed to account for such possession, or to show that such possession was honestly obtained, it is a circumstance tending to show his guilt." If the instruction upon that point had there closed, the prisoner would have had no cause of complaint, but the Court immediately added, "in fact, in such a case, the burden of proof is on the prisoner to show the possession to be lawful." The burden of proof, in respect to any point in the case, is cast upon the prisoner only in consequence of a *prima facie* case having been made against him. The people must make out their case by evidence that will amount to proof of the facts alleged in the indictment, and the defendant is not required to produce evidence to rebut such evidence on the part of the prosecution, as merely tends to prove the fact in question; but when evidence has been introduced, either direct or presumptive, sufficient to prove the fact in issue, then the defendant is called upon to rebut the *prima facie* case made against him.

, The learned Judge of the Court below was not without authority to sustain that portion of his charge, for it is said in 2 Wharton's Am. Crim. Law, Sec. 1,777, that "the possession of property recently stolen is *prima facie* evidence of guilt in

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the possessor of the property." But that doctrine has been modified in this State. In *People v. Chambers*, 18 Cal. 382, it is held that the possession by the defendant of property recently stolen, is not of itself sufficient to authorize his conviction, but is a circumstance to be considered in determining his guilt. (See 3 Greenl. Ev. Sec. 31.) In *People v. Ah Ki*, 20 Cal. 177, the instruction of the Court below, stating that the burden of proof was thrown upon the defendant, of explaining his possession of goods recently stolen, was under consideration, and the Court held the instruction to be erroneous. Mr. Justice Norton, in delivering the opinion of the Court, after holding that the instruction was erroneous, says: "If this charge could be understood as only stating that the accused was bound to explain the possession, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, it would not be erroneous." The proof of possession, together with proof of other circumstances indicative of guilt, would make a *prima facie* case against the defendant, and thereupon the burden of proof would be shifted to the defendant. It will be readily seen that under the rule laid down by the Court below, a person who had honestly come into possession of property recently stolen, might be convicted of larceny from the accidental circumstance that no one was present when he found the property dropped by the thief in his flight, or bought it from the thief.

It is to be regretted that this inaccuracy is found in the instructions, which, in other respects, are expressed in terms of commendable clearness and precision.

Section four hundred and seventeen of the Criminal Practice Act provides that the jury may render a general or special verdict, except on an indictment for libel, in which case it shall be general. It would have been improper for the Court to have directed them to render a special verdict, as asked for the defendant; but the Court, upon the request of either party, should direct them that they have the discretion

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as to rendering a general or special verdict, in accordance with the provisions of that section.

The other errors assigned do not require any consideration.
Judgment reversed and cause remanded for a new trial.

PETER H. BURNETT v. R. PACHECO, TREASURER OF
STATE.

STATEMENT ON APPLICATION FOR NEW TRIAL.—A statement on application for a new trial, which does not specify the particular errors relied on, or if it is claimed that the evidence is insufficient to warrant the verdict, the particulars in which the evidence is alleged to be insufficient, should be disregarded by the Court.

STATEMENT ON APPEAL.—A statement on appeal from the judgment, which does not specify the errors relied on, is insufficient.

APPEAL FROM JUDGMENT.—On an appeal from a judgment, the Court will not review the evidence for the purpose of determining whether the findings of fact are warranted by the evidence.

PLACE FOR ASSIGNMENT OF ERRORS.—The place for an assignment of errors is in the statement, and not in the notice of appeal.

APPEAL ON JUDGMENT ROLL.—If there is no statement on appeal, no specification of errors is required.

AGREED STATEMENT OF FACTS.—If the parties agree to a statement of facts, and stipulate that it may be used by either party in any and all proceedings in the action, the statement of facts becomes a part of the judgment roll.

APPEAL from the District Court, Sixth Judicial District, Sacramento County.

This action was brought against the State Treasurer to recover possession of ten State bonds.

The other facts are stated in the opinion of the Court.

George R. Moore, for Appellant.

C. T. Ryland, of counsel for Appellant.

J. G. McCullough, Attorney-General, for Respondent.

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By the Court, **SHAFTER, J.**

The complaint states that the plaintiff, in the year 1858, was the owner of ten State bonds of the State of California, issued under the Act of April 28, 1857; that in the year 1858, he deposited the bonds with one John H. Gass, of Sacramento, for the sole purpose of collecting and receiving the coupons, or interest, as the same should from time to time fall due; that thereafter, in September, 1860, Gass, without plaintiff's knowledge or consent, and against the statute in such case made and provided, and with intent to steal said bonds and the coupons attached thereto, converted the same to his own use; that such conversion first became known to the plaintiff in February, 1863; that in January, 1862, the bonds came wrongfully and unlawfully into the possession of D. R. Ashley, who, on demand made, refused to deliver them to the plaintiff. It is further averred that said Ashley, at the time when he became possessed of the bonds had full notice of the plaintiff's title, and that all other persons through whose hands said bonds passed, had like notice.

The answer denies all the allegations in the complaint, and avers that the bonds and coupons are the property of the State, and have been since the 7th of September, 1860; that the instruments were negotiable, and that the property in them passed by delivery; that the bonds had been redeemed and purchased by the State, after due proceedings, for eight thousand four hundred and seventy-eight dollars and seventy-five cents, which was their full value, and that immediately thereafter, and on said 7th of September, 1860, they were cancelled and deposited in the office of the Treasurer of the State, as a part and portion of the archives and records. At said date Thomas Findley was State Treasurer, from whom defendant Ashley, as his successor, received and has ever since held the papers.

Ashley having gone out of office, Pacheco, his successor, was made party defendant by stipulation.

The trial was by the Court. The decision was in favor of

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the defendant, and judgment was entered thereon December 18, 1863. Notice of motion for new trial was given in due season, based on the following grounds set forth in the notice:

First—Error in law occurring at the trial and duly excepted to by the plaintiff.

Second—Because the judgment is against law.

Third—Because the evidence in the case is insufficient to justify the judgment of the Court, and that said judgment is contrary to the evidence.

A statement of the case on motion for a new trial and on appeal, was prepared and filed. The statement contained a full report of the proceedings at the trial, including a report of the evidence; but the statement did not "specify the particulars in which the evidence was alleged to be insufficient;" nor the "particular errors of law occurring at the trial" upon which the plaintiff would rely in support of his motion, as required by the one hundred and ninety-fifth section of the Practice Act, as amended in 1863. The motion for new trial was denied, and the appeal is taken from the order of denial and from the judgment.

1. The motion for new trial was properly overruled. Under a positive provision of the one hundred and ninety-fifth section of the Practice Act, as amended in 1863, the Court was bound "to disregard the statement," for the reason that it was no statement under the rule established by that section. The statute is peremptory; the rule is one of great practical consequence, and the respondent insists upon its non-observance in this case as a point against the appeal. (*Hutton v. Reed*, 25 Cal. 478.)

2. The remaining questions arise under the appeal from the judgment.

The statement on new trial stands as a statement on appeal from the judgment, but the specification of grounds therein contained is as imperfect, when considered as a specification of errors on appeal from the judgment, as when considered as a specification of grounds on motion for new trial. (Practice Act, Sec. 338; *Wixon v. Bear River Co.*, 24 Cal. 367.) Fur-

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ther, on an examination of the record, we do not find that there were in fact any "errors in law occurring at the trial and excepted to by the plaintiff;" and as to whether the findings of fact were justified by the evidence, it is a question which cannot be reached, under any circumstances, through an appeal from the judgment. (*Gagliardo v. Hoberlin*, 18 Cal. 334.) The notice of appeal contains what it calls an "assignment of errors." The place for the specification of errors, in an appeal from a judgment, is in the statement, if there be one, (Prac. Act, Sec. 338,) and not in the notice of appeal; and if there be no statement, then as the questions must necessarily arise upon the judgment roll, no specification of errors is required. The second assignment contained in the notice of appeal is as follows: "Because said District Court erred in holding and deciding that the indorsement 'This bond not for sale; Peter H. Burnett,' on the back of each of the bonds in dispute, was not sufficient notice to subsequent purchasers and others to put them upon inquiry." The defendant's counsel has stipulated that the assignment of errors, contained in the notice of appeal, is a true copy of the original document, but refuses to admit the proposition of fact contained in the foregoing specification. As the parties do not agree that the Court made the decision recited in the specification, and as we cannot discover from any portion of the record that any such decision was made, nor even that the Court had occasion to consider the question, it would be aside from our office in error to pass upon a point lying thus in hypothesis.

Aside from the testimony of witnesses, there was an agreed statement of facts used on the trial, and it was stipulated that the statement might be used by either party "*in any and all proceedings in the action.*" We consider this agreed statement of facts as annexed to the judgment roll by the effect of the stipulation, and the question is, whether the judgment in favor of the defendant is to be considered as erroneous in view of the facts set forth in the statement. The statement gives the number, date and amount of each of the ten bonds, the title and date of the Act under which they were issued; states that

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the bonds and coupons attached were payable to *bearer*; that on the 7th of September, 1860, after due notice, the bonds and coupons were redeemed from D. O. Mills & Co. at eight thousand four hundred and seventy-eight dollars and seventy-five cents, paid in coin; that the bonds and coupons were thereupon cancelled, and have since that time remained in the office of the State Treasurer, and in his possession; that at the time of the redemption there was on the back of each and every of the bonds the following indorsement in the handwriting of the plaintiff, to wit: "This bond not for sale. Peter H. Burnett."

The statement further contains an admission of demand and refusal, and then closes as follows: "The legality of the aforesaid redemption is reserved for the determination of the Court; and the admissibility of the fact in evidence, as to whom said bonds were originally issued by the State, is reserved for the Court."

We find from the record that the plaintiff offered evidence tending to prove that the bonds when first issued, were the property of the plaintiff, and that they were delivered to Gass as his agent. This evidence was admitted by the Court, and if admitted improperly, the error was to the advantage and not to the prejudice of the plaintiff. As to the question of the "legality of redemption:" when tried by the facts of the statement, we can see no reason to doubt its legality. The statement of facts does not disclose, nor does the Court find, nor do the parties stipulate, nor does it appear in any manner as a *fact*, that the plaintiff was ever at any time the owner of the bonds; nor that he ever had any interest in them; nor that Gass was ever his agent, nor even that such a man as Gass ever existed. If it appeared as a fact that the plaintiff was originally the owner of the bonds; that while holding them in possession he put the indorsement mentioned in the statement upon the back of each of them, and that the bonds came to the hands of D. O. Mills & Co. without the knowledge or consent of the plaintiff, then the question might be presented as to what effect the indorsement would have to

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protect his title to the bonds as against the redemption; but as the case stands, that question is not presented, and therefore it cannot be considered.

Judgment affirmed.

SOLOMON ECKSTEIN v. DAVID CALDERWOOD, DUNCAN F. McDONALD, AND J. CAVIS.

DILIGENCE IN MOVING FOR NEW TRIAL.—If a motion for a new trial is not prosecuted with due diligence it should be dismissed on the application of the opposite party.

APPEAL from the County Court, City and County of San Francisco.

Defendant Calderwood moved for a new trial and appealed. The other facts are stated in the opinion of the Court.

P. G. Buchan, for Appellant.

G. F. & W. H. Sharp, for Respondent.

By the Court, CURREY, J.

In August, 1862, the plaintiff commenced an action of forcible entry and detainer in a Justice's Court against the appellant and two other persons for the recovery of a lot of land described in the complaint. The defendants appeared and answered. From the judgment rendered in the Justice's Court an appeal was taken to the County Court, in which the action was tried and a verdict and judgment rendered in favor of the plaintiff against the defendants on the seventeenth of January, 1863. The appellant Calderwood in due time gave notice of his intention to move for a new trial, and prepared a statement to be used on such application, to which the plaintiff proposed amendments. The statement was settled by the Court on the eleventh of May, 1863, by allowing certain of the amendments proposed, and then the appellant's attorneys

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obtained leave to take the statement proposed, and the amendments allowed for the purpose of engrossing the same. On the twenty-ninth of July thereafter the appellant served on plaintiff's attorneys a notice challenging the loyalty of the plaintiff to the Government. The plaintiff was at that time absent from the State, and time was granted to procure his affidavit of loyalty. This was obtained and filed on the twelfth of November, and on the twentieth of that month the plaintiff's attorneys gave notice to the appellant's attorneys that they would move the Court on the thirtieth day of said November to dismiss the motion for a new trial on the ground that appellant had failed to prosecute the same with diligence. On the twenty-seventh of November the appellant obtained from the County Judge an order that the plaintiff show cause before him on the first of December, 1863, why a resettlement of the statement on motion for new trial should not be made to conform to the facts stated in the affidavits and the minutes of the trial on which the order was made. This order was served on the plaintiff's attorneys on the same day. On the second of December both motions came on to be heard, the motion of the plaintiff being first taken up. The motions were argued by the respective parties, and afterwards, on the twenty-eighth of December, the Court made an order, first reciting that it appeared from the minutes and files of the Court that on the eleventh of May, 1863, the appellant's statement on motion for a new trial was settled, and that his attorney on the same day took from the files of the Court the proposed and amended statement for engrossment, and had retained them in his possession without engrossing them up to the time when the motion to dismiss was made, and therefore decided that the application for a new trial had not been diligently prosecuted, and granted the order dismissing the application for a new trial. The appeal is from this order and from the judgment in the case.

If the order was correct, then the judgment must be allowed to stand, because by the judgment roll, without a statement of the evidence, there appears to be no objection to it.

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After the statement was settled by the Judge, until the plaintiff's loyalty was questioned, over two months and a half elapsed in which the appellant might have engrossed the statement as settled and placed it on file with the Clerk of the Court. During the time the plaintiff's loyalty stood challenged the cause was suspended (Laws 1863, page 566); but after his affidavit was filed the appellant still remained inactive, with the statement and amendments which were allowed in his hands, and there they remained until the motion to dismiss his application for a new trial was made, and it appears that even then the ordered engrossment had not been made. The appellant's excuse for this omission and delay is that at the time of the allowance of the amendments the Judge made a memorandum upon the margin of the proposed amendments, declaring that they were "subject to any revision which may seem proper, on hearing of counsel, if a hearing shall be desired." The effect of this declaration was not to suspend the proceedings to an indefinite extent, nor to give to either of the parties an unlimited period within which to express his desire to be heard. If the appellant desired a revision of the amendments, and wished to be heard in reference thereto, he should have moved in the matter with due diligence. This, in our judgment, he did not do, and therefore we cannot overrule the discretion of the Court in the premises.

Judgment and order affirmed.

PETER G. PARTRIDGE v. CITY AND COUNTY OF
SAN FRANCISCO.

STATEMENT ON APPLICATION FOR NEW TRIAL.—If a new trial on the ground of errors occurring at the trial is asked for, the statement should specify the particular errors relied on, and if it does not it should be disregarded by the Court.

ACT GOVERNING STATEMENTS FOR NEW TRIAL.—The Act of 1863, amending the one hundred and ninety-fifth section of the Practice Act, is the law governing the preparation of statements on motion for new trial made after its passage.

Opinion of the Court.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Brooks & Whitney, for Appellant.

Delos Lake, and *John W. Dwinelle*, for Respondent.

By the Court, RHODES, J.

This is one of the class of cases usually called the *City Slip Cases*. The complaint contains two counts: the first being for money had and received by the defendant to and for the use of the plaintiff; and the second, for money paid, laid out and expended by the plaintiff for the defendant. Suit was commenced in April, 1855, and was brought on to trial in 1863; and on the 23d of June, 1863, the finding of the Court for the defendant was filed, and on the 2d of February, 1864, judgment was entered *nunc pro tunc* as of the 27th of February, 1863. The plaintiff moved for a new trial, and the grounds of the motion were, first, "Errors of law occurring on the trial of said cause and excepted to by the said plaintiff;" and second, "That the said decision was against law." The motion and statement were filed August 22d, 1863, and the motion being denied, the plaintiff, on the first day of October, 1863, appealed from the order denying the new trial and from the judgment.

The plaintiff now assigns for error the decision of the Court refusing to permit him to amend his complaint. It appears from the papers copied into the transcript that the plaintiff, upon his affidavit filed April 12, 1862, moved the Court for leave to amend his complaint, and that the motion was denied May 31, 1862. It appears also from the statement on the motion for a new trial, that William H. Taylor purchased the lot, that the deed was executed to him, and that he paid the purchase money which is sought to be recovered back by the plaintiff; that "on the 10th day of March, 1855,

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William H. Taylor assigned his right of action to plaintiff;” and that, on the testimony being closed, the defendant’s counsel insisted that there was a material variance between the case presented by the pleadings and the evidence, the complaint alleging that the defendant received the money to the use of the plaintiff, and the evidence tending to prove that it was received to the use of Taylor. The statement proceeds: “The plaintiff’s counsel contended that the variance should be disregarded, or that he should be allowed to amend. The Court ruled that it could not entertain a motion to amend, it appearing that the plaintiff had moved for leave to amend in the particular named, in the Twelfth District Court, while said action was pending regularly therein, and before said action was transferred to this Court, and that said motion had been denied by said Twelfth District Court. The Court then took the case under advisement, and afterwards rendered the decision that the said variance was fatal, and therefore directed a finding for the defendant, to which decision the plaintiff excepted.” This is all that is contained in the statement respecting the proposed amendment.

The counsel for the defendant, in answer to the error assigned, contends that the plaintiff’s affidavit and notice of motion to amend, and the amended complaint proposed to be filed, if the amendment should be permitted, must be disregarded, because they are not included in the statement on motion for a new trial, and because no statement on appeal was made or settled; that the error complained of was not excepted to; and that the statement does not specify the particular errors upon which the plaintiff intended to rely. These objections are fatal to the plaintiff’s position. The first and second objections are apparent upon an inspection of the record in this Court. The third objection depends upon section one hundred and ninety-five of the Practice Act as amended in 1863, and which took effect July 1, 1863. That section provides, among other things, that “when the notice designates as the ground of the motion, errors in law accruing [occurring] at the trial and excepted to by the moving party,

Points Decided.

the statement shall specify the particular errors upon which the party will rely. If no such specification shall be made, the statement shall be disregarded." The amended section of 1863 repealed by necessary implication the same section as amended in 1861, and was the law governing the preparation of the statement on motion for a new trial in this cause; and accordingly it became the duty of the Court below to disregard the statement on account of its failure to comply with the requirements of the section.

Judgment affirmed.

Mr. Justice SAWYER and Mr. Justice SHAFER, having been of counsel, did not sit in the case.

JACOB ELIAS v. JULIO VERDUGO, MARIA JESUS VERDUGO, HIS WIFE, FRANCISCO P. RAMIREZ, AND FERNANDO SEPULVEDA, *et als.*

EVIDENCE CONTRADICTING ADMISSIONS IN PLEADINGS.—If the complaint in an action against husband and wife to foreclose a mortgage executed by the husband alone, avers that the mortgagor, at the time of its execution, owned the land described in the mortgage as a tenant in common with another person, each owning an undivided one half, and the defendants in their answers admit this allegation, but set up as an affirmative defense a claim to a homestead, evidence to show a parol partition prior to the execution of the mortgage is irrelevant.

PAROL PARTITION OF LAND.—A parol partition of land owned by tenants in common, could be made in California before the adoption of the common law; but the agreement for such partition should be satisfactorily proved, and each tenant in common should have assigned to him and enter upon and possess a specific part of the land in severalty.

HOMESTEAD.—A homestead cannot be carved out of land held in joint tenancy or by tenancy in common.

DECREE IN FORECLOSURE SUIT.—If any of the parties defendant in an action to foreclose a mortgage claim title to the mortgaged premises, or any portion thereof, adversely to the title mortgaged, their rights under such adverse title should be saved in the decree.

APPEAL from the District Court, First Judicial District, Los Angeles County.

Ramirez and Sepulveda, two of the defendants, answered,

Argument for Respondents.

setting up title to several portions of the land claimed to be included in the mortgage, adversely to the mortgagor.

The Court decreed the sale of any portion of the southern half of the Rancho San Rafael which might remain after the assignment of a homestead of the value of five thousand dollars.

The other facts are stated in the opinion of the Court.

G. F. & W. H. Sharp, for Appellant.

A parol partition of land not carried into effect by possession of each party of his respective share according to the partition, is not valid and binding on the parties. (*Jackson v. Hardee*, 4 Johns. 202; *Jackson v. Duncan*, 14 Johns. 224, and cases cited in note a.)

Exclusive possession of one tenant in common of a particular part, accompanied by a denial of his co-tenant's right of possession in the part thus occupied, may grow into a legal presumption of partition having been made. (*Lloyd v. Gordon*, 2 Har. & McH. 254.)

No parol partition is effectual unless accompanied by deeds from one co-tenant to the other, inasmuch as the Statute of Frauds applies to such cases. (*Porter v. Hill*, 9 Mass. 34; *Porter v. Perkins*, 5 Mass. 232; *Snively v. Luce*, 1 Watts, 69; *Gratz v. Gratz*, 4 Rawl. 411.)

Volney E. Howard, for Respondents.

There is a sufficient part performance shown in this case to take the division out of the Statute of Frauds in equity. Julio settled, built on and improved his part. His sister settled and occupied her part of the land. Neither party, and especially Catarina, could refuse to execute the agreement without a fraud upon the other. The principle applies to a parol purchase under the Spanish law. (*Tohler v. Folsom*, 1 Cal. 207.)

Taking possession is such part performance. (*Arguello v. Edinger*, 10 Cal. 158.)

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The fact that the cattle ran from one part to the other, does not affect the question of possession, especially when it is shown that Julio built houses and planted vineyards according to the division, and has resided on his part for about twenty years.

The position that there can be no homestead in land held in a tenancy in common, or joint tenancy, is an unfounded assumption, and all our decisions on that subject go on that ground. (*Wolf v. Fleischacker*, 5 Cal. 244.)

It is perfectly easy to ascertain the respective parts of each tenant. It is capable of mathematical ascertainment and certainty. It is a direct and palpable violation of the statute, which declares "the homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof," etc. There can be no doubt as to what tract is intended. And if two or more tenants in common had built different dwelling houses on the same tract, a Court, on division, would assign to each his improvements, with an equitable division of the quality and quantity. If the land had to be sold to effect a division, the proceeds could be divided with equal facility. (*Brookfield v. Williams*, 1 Green's Ch. R. 341; *Thompson v. Hardman*, 6 J. Ch. R. 436; *Wood's Digest*, 202.)

By the Court, SAWYER, J.

This is an action to foreclose a mortgage executed by Julio Verdugo on the second day of January, 1861, upon the land described in the complaint. A portion of the lands were known as the "Rancho of San Rafael." The principal question in the case is, as to whether the defendants, Verdugo and wife, are entitled to have a homestead reserved from the operation of the mortgage and decree. The case was tried by the Court without a jury, and the fourth and fifth findings are as follows:

"4. The Court also finds that, at the time of the execution

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of said mortgage, the southern portion of the Rancho of San Rafael was the residence and homestead of said Julio Verdugo and wife and family; that said Rancho of San Rafael was acquired by Julio Verdugo and his sister Catarina by inheritance from their father, and that there was a parol division of said Rancho of San Rafael between said Julio and Catarina before the acquisition of California by the Government of the United States, followed by immediate possession of their respective portions, and continued for a long series of years anterior to the execution of the mortgage, and for more than ten years previous to the change of Governments. That by said division Catarina received and possessed the upper or northern half of the rancho, and Julio the southern or lower half. That said Catarina resided on and held the northern half containing the old family residence. That Julio moved to, and built on and resided, with his wife and family, on the southern half, where he resided with his family at the time of the execution of the mortgage, and which was the homestead of himself and wife at the time, under the Act of the Legislature of 1851; and that the same was duly recorded as their homestead on the 13th day of April, 1861, in compliance with the Act of April 28, 1860."

"5. That there was a division of the whole mortgaged property between Julio and Catarina in 1861; but that, as to that portion of the property, to wit, the Rancho of San Rafael, acquired by inheritance, it was merely a confirmation of the ancient verbal division."

Upon these findings the Court decreed, that a homestead of the value of five thousand dollars should be selected and set apart. Plaintiff moved for a new trial, which was denied, and the appeal is from the order denying the motion.

After setting out the note and mortgage, the plaintiff, in his complaint, avers, "that at the time of the execution, delivery and record, as aforesaid, of the said mortgage, the said mortgagor, Julio Verdugo, was the owner, in the tract described in said mortgage, as tenant in common with Catarina Verdugo — the said Julio and said Catarina each owning one undivided

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one half; that after the execution, delivery and recording, as aforesaid, of the said mortgage, the said Julio Verdugo and Catarina Verdugo, on the 13th day of April, 1861, by deed of that date partitioned and divided said tract of land in the mortgage described between them." These allegations are not in any manner denied, or put in issue in any of the answers in the case. On the contrary they are in express terms substantially admitted. Defendant Julio Verdugo, in his answer avers, "that said defendant and his wife, being the owners of one half of premises in complaint described, recorded their declaration setting apart a certain portion including the dwelling house as their homestead," and the wife, Maria Jesus Verdugo, in her answer, alleges "that her husband, Julio Verdugo, being seized in fee of one half of premises as set out in said pretended mortgage, the said Julio Verdugo and this defendant, his wife, made their declaration according to law, setting apart certain portions, including their dwelling house, of said premises as their homestead," etc. They do not here aver a seizin in severalty of any particular portion of the land, but a seizin of one half of the whole, a very remarkable allegation in view of the averment of a tenancy in common in the complaint and a failure to deny that allegation, if the defendants intended at that time to rely upon a seizin of the entirety of a specific portion in severalty. There is no attempt in either answer to deny, or take issue upon any allegation of the complaint. The defendants set up, as an affirmative defense, a claim to a homestead, and rely upon the invalidity of the mortgage to the extent of the homestead value, on the ground that it was not executed by the wife. Upon the pleadings, the tenancy in common of the lands covered by the mortgage was not in issue, and the evidence to show a parol partition was irrelevant to the issues, and contrary to the facts as they stood admitted by the pleadings. But independent of this, the testimony to show a parol partition between Julio and Catarina Verdugo is extremely meagre, vague and unsatisfactory. There are two witnesses, Julian Chavis and Fernando Sepulveda, who testify, that, "for two years before the change

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of Government in California, in the family of the Verdugos the northern part of the Rancho of San Rafael had been recognized and regarded as belonging to Catarina Verdugo, and the southern part as belonging to Julio Verdugo, and that the houses and gardens and other private property and peculiar improvements of each were on such respective parts." Sepulveda also testifies, that since 1843, "there has been a recognized parol division between Catarina Verdugo and Julio Verdugo, by which Catarina retained the old homestead of the family, and the upper, or northern half of the rancho, on which she has resided since 1833. That Julio took possession of the lower, or southern half of the rancho, and has, to the knowledge of the witness, resided on the same since 1843, when he had houses built by himself, a vineyard and cultivated fields. That he has heard both Catarina and Julio state that the ranch was divided and occupied as above stated since 1843; and that the division was always so recognized in the family." And on cross examination it was stated "that Julio Verdugo, the defendant, had always exercised care and control for his sister Catarina, over the northern part of the rancho as well as the southern—they both having cattle, which ranged on the whole rancho, and were all cared for by Julio Verdugo in the same manner, and no difference was made in the rodeo limits."

This is all the testimony to show a valid parol partition, and it may all be true in the general sense stated by the witnesses, and yet there be no parol partition known to the law with an intent to accomplish a division of the land, by which each should hold title to a specific part in severalty. The witnesses gave their general conclusions, without attempting to state any specific agreement or contract between the parties. If there was any definite agreement between Julio and Catarina, it does not appear in the record, and we know nothing of its terms. Whether it was for the purpose of temporary occupation, or with a view to severing their tenancy in common and vesting the title in severalty to a portion in each, does not appear. They lived, it is true, in separate houses, on different portions of the land, and cultivated sepa-

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rate fields, but the other portions of the rancho appear to have been occupied in common by their cattle, all of which were under the control of Julio. Such occupation is very general among tenants in common in this State, in which a very large portion of the valuable lands are held as tenancies in common.

The testimony of the defendants as to the parol partition is of the most unreliable character. On the other hand, all the documentary evidence in the record shows that the parties themselves did not suppose they held specific portions of the rancho in question in severalty. The defendant, Julio, describes the entire rancho in his mortgage—not the southern half merely. So, also, the petition in the record to the Land Commissioners for confirmation of the grant is presented in the names of Julio and Catarina jointly, and the title is confirmed to them according to their petition as coparceners. So also in the deed of partition executed between them since the execution of the mortgage in question, there is no recital of, or reference to any prior partition, but on the contrary the deed recites: "That whereas, the said Catarina Verdugo, and Julio Verdugo do have and hold, and are seized in common and as tenants in common in equal parts of those certain tracts or parcels of land," etc., describing two tracts, one being the "Rancho of San Rafael." * * * * "And, whereas, both of said tracts of land adjoin and are connected one with the other; now, therefore, it is covenanted, granted, concluded and agreed by and between the said Catarina Verdugo and Julio Verdugo * * * * that a partition of said lands seized by them in common be made in the manner and form following," etc. In view of these facts, and the facts that stand admitted by the pleadings, it is manifest that the evidence is insufficient to support the findings.

At the time the pleadings were filed, it is evident, that the defendants did not rely upon a parol partition, for their answers are not framed upon any such theory.

That a valid parol partition might have been made under the law which prevailed in California before the adoption of

Opinion of the Court.

the common law, we have already held in *Long v. Dollarhide*, 24 Cal. 222. But agreements in relation to land resting in parol ought to be very satisfactorily proved.

Respondents insist, that the decisions to the effect that a homestead cannot be carved out of land held in joint tenancy, or by tenancy in common, are erroneous and ought to be overruled. It is now too late to re-investigate the reasons upon which those decisions are based. The first of the series, *Wolf v. Fleischacker*, 5 Cal. 244, was made nine years ago. The decision was affirmed in *Reynolds v. Pixley*, 6 Cal. 167; *Giblin v. Jordan*, 6 Cal. 417; and *Kelleisberger v. Kopp*, 6 Cal. 565; and since that time the construction of the statute upon the point involved has been regarded as settled. The parties in this case may have relied upon those decisions in dispensing with the signature of the wife to the mortgage.

The rights of Ramirez and Sepulveda, held adversely to the title mortgage, should have been saved in the decree. (*San Francisco v. Lawton*, 18 Cal. 478.)

The order denying a new trial is reversed, and the cause remanded for further proceedings.

JOHN AGNEW v. STEAMER CONTRA COSTA.

LIABILITY OF STEAMBOAT AS A COMMON CARRIER.—In an action against a steamboat, as a common carrier, for the loss of a horse by the explosion of the boiler, alleged by the plaintiff to have been caused by racing with a rival steamer, evidence on the part of the defense to show the good condition of the boiler is irrelevant, both on the question of liability and of damages.

SAME.—In such case, evidence on the part of the defense that the engine and boilers were strong, and that extraordinary care was used by the officers and crew of the steamer in their management while racing, is also irrelevant.

LIABILITY OF COMMON CARRIER.—The presumption of the law is against a common carrier, except it be made to appear that the injury complained of could not have happened by the intervention of human means.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

Argument for Respondent.

Plaintiff offered no evidence upon the condition of the boilers.

Plaintiff recovered judgment in the Court below for the value of the horse and interest on the amount, and defendant appealed.

The other facts are stated in the opinion of the Court.

E. W. F. Sloan, for Appellant.

It is a general rule of law that interest is not recoverable on unliquidated demands. (Sedgw. 377; *Holmes v. Rankin*, 17 Barb. S. C. 454.) It was said by Mr. Justice Washington, in *Gilpin v. Consequa*, Peters' C. C. R. 95, that "as to interest this is a question generally in the discretion of the jury. But it is not agreeable to legal principles to allow interest on unliquidated and contested claims, sounding in damages."

An exception to that rule has been allowed in a case where there was proof of negligence and improper conduct.

It was said by the Supreme Court of New York, in *Watkinson v. Lawton*, 8 J. R. 217: "The question of interest depends upon circumstances. The jury may give interest, by way of damages, in cases in which the conduct of the master was improper. But here no bad conduct is to be attributed to him, and interest is not, in every case, and of course, recoverable, because the amount of the loss is unliquidated, and sounds in damages to be assessed by the jury."

That being the rule, it would seem to follow that the Court below erred in excluding the proof offered by the defendant for the purpose of showing that the case did not fall within the exception.

Wm. H. L. Barnes, for Respondent.

The deposition of Coffee was incompetent and irrelevant.

In actions against a common carrier to recover damages for the non-delivery of goods intrusted to him, the measure of damages is the value of the goods at the place of destination, with interest from the day when they should have been delivered. (Sedg. on Meas. of Dam., 354, and cases cited.)

Argument for Respondent.

In such an action, the defendant might prove a part performance of his contract, a late delivery, or a delivery in a damaged condition, of the goods, so as to reduce the amount of damages to which the rule would otherwise subject him; because the action has only one object, viz: to place the parties in the same situation in which they would have been if the contract had been fulfilled, and so limit the recovery to the actual loss sustained. (Story on Bailments, § 582, *a*, and cases cited.)

In the present case there was a total destruction of the property intrusted to the carrier, and no matter what the condition of the boiler of the defendant was, the indemnity to which the plaintiff was entitled for the loss of his property could not thereby be reduced or changed. The deposition was, therefore, incompetent as evidence in mitigation of damages.

The defendant's counsel seemed to be laboring under an impression that the responsibilities of carriers of goods for hire and of carriers of passengers for hire were identical, and that what would excuse the carrier of passengers would also exonerate the carrier of goods. The distinction between them in this respect is manifest. In the case of the passenger carrier, it might be proper to permit him to show, affirmatively, facts which would authorize the conclusion that the utmost care, diligence, and prudence were exercised; because the common carrier of passengers is not in any sense an insurer, but is answerable only for injuries to passengers against which the utmost skill and prudence could not guard. But even the exercise of the utmost skill and prudence has been held immaterial in an action against a common carrier to recover damages for injuries to *passengers*, and he has been held responsible for latent defects in machinery, or the structure of the road, whether discoverable by the exercise of the utmost skill and care on the part of the defendants or not. (*Hegeman v. Western R. R. Co.*, 3 Kernan, 9.)

But the liability of a common carrier of goods, by water, in a vessel propelled by steam, does not end when he has

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placed on board good and sufficient engines and boilers, *capable of sustaining twice the amount of steam sufficient to explode them.* Nor when he has secured a good captain and skilful officers and agents to manage his machinery. Except as against the two classes of accidents of which we have spoken, he is the absolute insurer of the goods intrusted to him—he must deliver them or pay for them. If the offer in question could be considered an offer to prove any *fact*, or present any fact upon which the Court could pass as admissible or otherwise—which is denied—such facts would have been utterly unavailing to show that the damage in question occurred by act of God, or was one towards which no human agency had contributed. It is the most ordinary duty of a common carrier by water, in steam vessels, to supply good boilers and competent engineers. Happily for life and limb they are generally found in such vessels. But their presence cannot prove the absence of human agency in producing a disaster of this description, nor make the liability of the carrier greater, nor diminish it a hair.

By the Court, SHAFER, J.

This action was brought to recover damages for the loss of a stallion, by means of the negligence of the defendant as a common carrier between the cities of San Francisco and Oakland.

The plaintiff introduced evidence tending to prove that on the 3d day of April, 1859, he embarked the stallion on the "Contra Costa," at San Francisco, to be carried for him to the City of Oakland. That the horse was put by the captain of the boat opposite the boiler in the place where horses were usually stationed. That the boiler of the steamer exploded on the passage, and that the horse was so far injured by the explosion that he died on the same day. That the Contra Costa was at the time racing with a rival steamer running between the same *termini*; that there was betting among the passen-

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gers of the Contra Costa, which betting was encouraged by the assurances and conduct of the engineer.

The defendant offered in evidence the deposition of George W. Coffee, "for the purpose solely of showing the condition of the boilers of the steamer." The plaintiff objected to the evidence as incompetent and irrelevant, and the Court sustained the objection. The appellant claims that this ruling was erroneous.

Where the cause of the damage for which recompense is sought is unconnected, as was the case here, with the conduct or propensities of the animal undertaken to be carried, the carrier is subjected to the ordinary responsibilities connected with his vocation. (*Palmer v. The Grand Junction Railway Company*, 4 Mees. and Wels. 749; *Clarke v. The Rochester and Syracuse Railroad Company*, 14 N. Y. 574.) In the case at bar, the boilers were either sufficient or insufficient. If they were insufficient, proof of the fact could have been of no service to the defendant, of course; and if sufficient, the proper deduction from the fact would be, not that the explosion resulted from the act of God, but from some fault in the management—the very cause to which it was attributed in the theory of the plaintiff's case. The defendant was an insurer against all injury not resulting from the act of God or the public enemies, or from the conduct of the animal; and it follows that the good condition of the boilers had as little to do with the question of liability and with the question of damages also, as the condition of the rudder or the general staunchness of the ship, the misconduct charged being assumed or given.

Upon the exclusion of Coffee's deposition, the defendant offered to prove "that all skill and care and prudence were used, as far as human foresight would go, and that defendant did in fact provide and have on board a good and sufficient engine and boilers, capable of sustaining a pressure of steam twice the amount that was in the boiler at the time of the explosion, and that the master, engineer, crew and defendant so conducted themselves that the explosion occurred by inevitable accident or unknown causes, and against which precau-

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tion and skill could not guard." On objection taken by the plaintiff this evidence was also excluded.

As between Court and counsel, the offer lacks the simplicity and directness called for by the occasion.

It is complicated and somewhat confused. The plaintiff's case imputed the explosion to the racing and its incidents, and proof was introduced of that misconduct by him, as we must intend, not so much for the purpose of proving the liability (*Boyce v. The California Stage Company*, 25 Cal. 460,) as for the purpose of enhancing the damages by interest on the value of the animal. (*Watkinson v. Laughton*, 8 Johns. R. 217.) If the defendant proposed to meet the case in this aspect of it, the offer should have been to disprove the particular misconduct imputed. But the offer, as made, does not necessarily impart anything more than an offer to prove that a reckless act was carefully performed.

But there is another aspect under which the question may be presented. Let it be assumed that the purpose was to prove as a proposition of defense that explosion resulted from the *vis major*, and that the proof of the strength of the boilers and of extraordinary care, on the part of officers and crew, was offered for the purpose of supplying grounds of presumption. The answer is that there is no logical connection between the strength of the boilers and extraordinary care in the management on the one hand, and *vis major* propounded on the other—as little indeed as there is between the same facts and the conclusion that the explosion was caused, or that the horse was killed by public enemies. (*Boyce v. California Stage Co.*) Proof that the boilers were sufficiently strong would establish merely that the horse was not killed by reason of their weakness. Proof that extraordinary care was used, would prove simply that the explosion occurred in spite of it, but it would throw no light upon the question of whether it did or did not result *acto Dei*. Between the point at which extraordinary care on the point of a bailee may be said to terminate, and the point at which "superior force" may be said to begin, there is a wide space for the interposition of other agencies, and the

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law *presumes* against a carrier in every case, except it be made to appear that the injury complained of could not have happened by the intervention of human means. (*Forward v. Pittard*, 1 T. R. 27.)

Other errors are assigned, but none that require particular notice.

Judgment affirmed.

By the Court, SHAFER, J., on petition for rehearing.

Petition for rehearing. The rehearing is asked for on the ground that "the attention of the Court has been by some means diverted from the only point presented for consideration in appellant's brief" to wit: the charge of the Court "that interest can be allowed against a common carrier only when it shall appear that there was fraud or gross misconduct in carrying the property or in the transaction." The brief referred to "invites the attention of the Court to the errors numbered four, five, six, and twelve," in the transcript. Number four is as follows: "Error of the Court in refusing to allow the defendant to read in evidence the deposition of George W. Coffee, and refusing to allow defendant to show the good condition of their boilers and steam engine in mitigation of damages." Both of these questions are considered in the opinion, and both, on reasons given, were decided against the appellant, on the ground that the evidence offered was not admissible to mitigate the damages, nor for any purpose. Number five, to which our attention was also specially solicited, is as follows: "Error in the Court in refusing to allow the defendant to prove by competent witnesses that all possible skill, care and prudence was used on the part of the agents and servants of the defendants." That question is also discussed in the opinion and determined against the appellant. It will be observed that the assignment does not bring the error alleged into relation with the point of damages; but we, nevertheless, after disposing of the error as related to the point of the defendant's liability, passed upon it as it stood con-

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nected with the question of damages, as is apparent on the face of the opinion.

Number six is as follows: "Error of the Court in refusing to allow defendant to prove that the boilers of defendant were capable of sustaining twice the amount of steam contained therein at the time of the alleged explosion, and that the engineer, master and crew of defendant were entirely without fault or negligence." This point, also, is not brought expressly into relations with the question of damages, but the "means" by which we were induced idly to discuss and idly to pass upon it, though forgotten by counsel, have now become apparent.

As to the charge of the Court upon the subject of allowing interest by way of damages, we did not discuss it, for two reasons, one of which was that its correctness was indisputable, and the other was that its correctness was not disputed by counsel; and, as already stated, we held, on discussion, that the general evidence which the defendant offered of "care," and "extraordinary care," and "of all possible care," and to the effect that the "boilers were in good condition," etc., was inadmissible, for the reason that the defendant did not undertake to controvert the specific fact of racing with a rival boat for the purpose of winning bets encouraged by the engineer — holding that the theory of mitigation upon which the rejected evidence was offered amounted to this — that if it could be shown that the luxury and recklessness of racing was indulged in with "good boilers," strained to bursting with "extraordinary care," that then, and in that event, the defendant should be let off from paying interest on the value of the stud, by way of damages. On these grounds we consider that, as matter of fact, no question was discussed in the opinion except such as our attention was specially called to by counsel, and that the question which counsel conceives was entirely overlooked, was, on the contrary, entirely exhausted.

Petition for rehearing denied.

Mr. Justice CURREY expressed no opinion.

T. L. BUCKOUT v. FRANCIS P. SWIFT, MARGARET SWIFT, AND JOHN LOWELL.

ISSUES OF FACT RAISED BY ANSWER.—Where there are no findings of fact in an action tried by the Court, all the issues of fact raised by the answer are deemed to have been found in favor of the party who recovers judgment.

REMOVAL OF A HOUSE FROM THE FREEHOLD.—The severance and removal of a house from the freehold changes the character of the house from real to personal property, whether the severance is by the act of God or of man.

MORTGAGEE'S RIGHT TO AN INJUNCTION.—The mortgagee of a lot on which a house is standing, cannot enjoin the mortgagor or his assigns from removing the house from the lot, except upon proof that the lot without the house will be an inadequate security for the mortgage debt.

SAME.—The severance and removal of a house from land covered by a mortgage withdraws the house from the operation of the mortgage lien; and after the removal the mortgagor or his assignee has a right to sell the house, and the purchaser may convert it to his own use.

APPEAL from the District Court, Sixth Judicial District, City and County of Sacramento.

The facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

The Court erred in dismissing plaintiff's bill as to respondent, Lowell. The refusal of the injunction, however, made it impossible for the Court, in accordance with its ruling on the motion for an injunction, to do otherwise than dismiss the bill as to the respondent Lowell.

We, however, contend that it was a gross act of spoliation on the part of Swift and Lowell, the one to sell and the other to buy the house as it stood in the street.

We cite generally the following authorities to show that in no event could the Court below have been right: "Things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment, pass with the realty." (1 Hilliard on Real Property, p. 26.) And pass by mortgage without being specially named. (Ib. 28.) A grant of land carries houses with it. (2 Washburne on Real Property, p. 625.)

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E. B. Crocker, for Respondent.

By the Court, SHAFER, J.

On the 4th of October, 1861, Francis P. Swift and his wife, for the purpose of securing the payment of a promissory note made and delivered by him to the plaintiff, mortgaged a lot in the City of Sacramento, on which stood a dwelling house occupied by Swift and his family, and in which they continued to live until the great flood of 1862, when the house was carried, by the rush of water, into the street a short distance from the mortgaged lot, where it stood when this action was brought. A short time before the commencement of the action, Swift made a contract with the defendant, Lowell, to sell him the house, and Lowell was about to remove it, when the plaintiff brought this action to foreclose the mortgage and to restrain the removal. It was alleged in the complaint that the house, at the date of the mortgage, was affixed to and formed a part of the realty, and that it was chiefly valuable to be used in connection therewith; and that Lowell bought with full notice of all the facts, and that he was destitute of property. The plaintiff obtained upon his complaint, from the County Judge, an order restraining the defendants from selling, taking away, or injuring the house. The order was thereafter dissolved, and an injunction refused by the District Court, upon the complaint alone.

Thereupon, Lowell answered, and, at the trial of the cause, the Court rendered a judgment against the defendant Swift for the amount due on the note, and a decree for the foreclosure of the mortgage and for the sale of the mortgaged property, excepting the house, and as to that, it was ordered and adjudged that the decree should not affect nor authorize its sale; and the Court dismissed the complaint as to Lowell and gave judgment in his favor. The appeal is from the order dissolving the restraining order and refusing to grant an

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injunction, and from that part of the decree which dismissed the bill as to the defendant Lowell.

There is a document in the record headed "Statement on Appeal." Amongst other things, it contains the pleadings in the action, an agreement that certain facts detailed were "proved," and a medley of evidence given by the witnesses of the respective parties. On this appeal we can make no reference to the evidence, for the purpose of determining whether the judgment is right or wrong. There was no motion for new trial, nor are there any questions arising upon the admissibility of evidence. There are no findings in the case, and we must therefore intend that all the issues of fact raised by Lowell's answer were found in his favor; that is to say, we must intend that the Court found that the lot, without the house "was sufficient security for the debt;" that the defendant "purchased the house of Swift and fully paid him therefor," and that "the defendant is possessed of sufficient means to respond in damages at law." There are other issues raised by special denials in the answer, but the denials are either of immaterial averments or involve mere conclusions of law. It is charged in the complaint that the house was standing upon the lot when the mortgage was made and recorded in October, 1861. That the house was thereafter, in 1862, floated by the flood from off the land into an adjacent street. That the house was the one which Lowell bought, and that the fact of their identity was known to Lowell at the time he purchased. All these averments must be taken as true, for none of them are denied. The facts, which by the statement were "proved," may be laid out of account for they do not bear upon any question which we shall have occasion to discuss.

In view of the facts admitted by the pleadings, it cannot be doubted that the house was originally real estate, and was affected, as such, by the mortgage lien. (2 Wash. R. P. 625.) That point we consider to be so fully established by authority as not to admit of discussion. We shall consider the case under two distinct aspects.

First — Upon the hypothesis that the lien of the mortgage

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remained upon the house after it took on the character of personal property by severance and removed from the freehold.

So far as legal effect is concerned, it matters not whether the severance was by the act of God or the act of man. The severance, *proprio vigore*, changed the character of the property from real to personal, irrespective of the means by which it was accomplished. If, while the house was yet upon the land, the mortgagor, or any one claiming under him, had threatened to remove it, and the mortgagee had filed a bill to restrain the removal on the ground of waste, the removal would not have been enjoined, except upon proof, that, as matter of fact, the lot without the house would be an inadequate security. The general rule in equity is, that a mortgagor, in possession, has the right to cut timber on the lands mortgaged, and to do other parallel acts, and a Court of equity will not interfere to restrain him or his assigns in the exercise of that right, until it is made to appear that the cutting, or other like act, is being carried to an extent calculated to render the land an insufficient security for the amount due upon the mortgage. (*King v. Smith*, 2 Hare, 239; *Brady v. Waldrons*, 2 J. Ch. 147; *Hampton v. Hodges*, 8 Ves. 105; *Wright v. Atkyns*, 1 Ves. and Beav. 314; *Van Wyck v. Alliger*, 6 Barb. S. Ct. R. 511; 2 Story's Eq. Sec. 915.) Now, if in the absence of the fact named, a mortgagor would have the right to withdraw timber, growing upon the mortgaged lands, from the lien of the mortgage, by severing and converting it to his own use, why should he or his vendee, in the absence of the same fact, be restrained from converting the property after severance, assuming it to be then subject to the lien? The questions are identical. Both bear upon a common point, which is as follows: If the mortgagor is allowed to exercise his equitable right of withdrawing timber, etc., from the operation of an admitted lien, will or will not the security be endangered? No authorities have been cited by counsel bearing directly upon this question, and we have not been able to find any that directly control it; but on the ground of strong and manifest analogy, we consider that both of the cases stated

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should be taken as subject to the same rule. This conclusion disposes of the appeal upon the hypothesis of the appellant that the house was under the lien of the mortgage after its removal from the land.

Second — But we consider that by removal from the land the house was effectually removed from the operation of the mortgage lien.

The mortgage was, by its terms, limited to land as its sole subject matter; and so long as its terms remained unchanged it could not be made to comprehend anything else.

Again: A building, severed and removed from mortgaged lands, of which lands it formed a part when the mortgage was given, is disencumbered of the lien, substantially on the same principle that a building erected upon the lands after the giving of the mortgage is subjected to the lien. In the first case, the building is withdrawn from the operation of the mortgage, for the reason that it has ceased to be a thing real; in the other, mere materials are brought under the lien, for the reason that they have become a structure by combination, and the structure has become a thing real by position. In both cases position is the pivot of judgment.

Again: A mortgagee, as we have already seen, may, under certain circumstances, restrain the mortgagor from cutting and removing timber from the lands covered by the mortgage; but that doctrine goes upon the very ground that if the timber should be cut, or at least cut and carried away, it would, in its new character of personalty, be withdrawn from the operation of the lien by the sheer force of the change.

Again: If the lien of a mortgage should be held to follow things severed and removed from the freehold, the doctrine would involve a series of notable consequences and investigations. Minerals removed from mines under mortgage — crops, timber, buildings, and the materials, even, of which the buildings were constructed, when severed and removed from lands under mortgage, could be pursued under proceedings in foreclosure into the hands of all parties, or, at least, into the hands of all parties taking with notice. And of what avail would

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all this be to mortgagees in the large and in the long run? And under what rule should the lien of the mortgage be enforced? Under that applicable to things real, or the one applicable to things personal? Most probably after the method applicable to things real. But in that event, should the property be sold on view, or without view by the bidders, and in whatsoever hands it might chance to be? If on view, then under what known process could the Sheriff seize, hold, and produce the property at the sale? And if not on view, then could the purchaser call for a writ of assistance if the holder of the property refused to deliver it? And how would it be as to the ordering of redemptions or as to the possibility of any redemption? Would a bill of sale, executed by the Sheriff, pass the title, or would a deed be necessary? and if the latter, then would the things personal be included by intendment in a deed of the *terra firma*, or should they be specially mentioned therein?

But we consider it unnecessary to push the general reasoning further, for the question presented was met and determined in *Codrington v. Johnstone*, 1 Beavan, 520. It was held in that case that a mortgagee taking possession, or a receiver appointed on his behalf, is not entitled to crops of the estate, previously severed and consigned by the mortgagor, though not actually received by the assignee.

We hold, then, on principle and on authority, that when the house in question was removed from the land, it was withdrawn from the operation of the mortgage lien, and that the mortgagor had the right to sell it, and that Lowell had the right to buy and to convert it to his own use.

Judgment affirmed.

Mr. Justice SAWYER expressed no opinion.

WILLIAM NORRIS v. SAMUEL J. HENSLEY.

CONSTRUCTION OF A WILL.—If by the terms of a will the estate is devised to "A," to have and to hold during his lifetime, and then to go to his heirs; if the word "heirs" is used in a general sense to indicate those to whom by law the property would pass by descent, and not in a special or restrictive sense to designate certain particular individuals, the whole estate vests in "A" in fee simple, notwithstanding the language of the will limits him to a life estate.

ISSUE.—The following was the language of the bequest in the will: "I bequeath to Dr. Van Canaghen, one third of my property on California street, and one third to my son, and one third to my brother, each and all of them to have and to hold their lifetime, and then to go to their heirs and assigns. But never to sell." *Held*, that by the terms of the will, the three devisees named took a fee simple estate in the property devised.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

R. F. Morrison, for Appellant.

The question thus arising for adjudication by this Court is, perhaps, a new one, so far as the judicial history of the State is concerned, and its novelty is fully equalled by its importance. There is no doubt that the learned counsel for the defense will invoke an arbitrary rule of construction known as the "Rule in Shelley's Case," and will urge that in England, as well as in several States of this Union, the meaning of the language used in this will has received a judicial construction adverse to the plaintiff's right to recover in this action. But however far the Courts may have gone in establishing the rule in *Shelley's Case*, we insist that where the intention of the testator is so perfectly clear as it is in the will of Elizabeth Townsend, the Courts cannot apply an arbitrary rule of law, and thereby entirely defeat the wishes and intention of the testator as they manifestly appear upon the face of the will. It has been so held in numerous cases, and we doubt not such is the principle now well settled by the authorities. (*Tanner v. Livingston*, 12 Wend. 92.)

The fundamental rule is that the intention of the testator is

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to be collected and allowed, though not expressed in legal language. *Where the intention is clear to give only a life estate, it should govern.* (*Rogers v. Rogers*, 3 Wend. 509.)

The reasons upon which the rule in *Shelley's Case* is founded, never had any application to the entirely different condition of things in this country.

The laws of primogeniture and the doctrines of feudal tenures prevailing in England are unknown to us, and there is no good reason in law or logic for applying to the changed state of affairs here an old, arbitrary rule, such as that laid down in *Shelley's Case*. The foundation of the rule and the reasons why it should not be allowed to interfere with the intention of a testator in this country, are clearly set forth in the opinion of Mr. Justice Barlow. (See case of *Schoonmaker v. Shirley*, 3 Denio, 492.)

Again, the rule in *Shelley's Case* was laid down with reference to a common law conveyance, and although it has been extended in its application to wills, yet there is more latitude of construction allowed in case of wills in furtherance of the testator's intention. (4 Kent's Commentaries, 226.)

These authorities, and the numerous cases to which they refer, clearly show that the arbitrary rule of law laid down in *Shelley's Case*, is by no means of controlling force and effect, regardless of the clear and manifest intention of the testator, but on the contrary, where it is perfectly obvious from the language of the testator that a life estate was intended to be created, only such an estate will pass remainder in fee to others. Indeed, it is a favorite doctrine with the Courts, that in the construction of wills, the intention of the testator shall be the pole star, and the cases in which such intention is rejected constitute the exception and not the rule.

Delos Lake, for Respondent.

The case is directly within the rule in *Shelley's Case*, (1 Coke, 104,) which is stated by Preston thus: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there

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is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." (4 Kent's Com. 215.)

This rule has been the common law of England for near five hundred years, and is stated by Chancellor Kent to be "received and adopted in the United States as part of the system of the common law." (4 Kent's Com. 229.)

In this State the common law of England is, by statute, made the rule of decision. The case of *Tanner v. Livingston*, 12 Wend. 83, is plainly distinguishable from this. In that case the devise was to Le Roy and Anna Livingston for their natural lives. Then, in a separate item, and as a separate devise, the remainder is devised to the *heirs male* of Le Roy and Anna.

Under the law in *Shelley's Case*, Le Roy and Anna Livingston would have taken, under the will, an estate tail, except for a provision in the will that the heirs male should take an estate in fee simple as tenants in common. But as entails had been abolished by statute, the rule in *Shelley's Case*, of course, could not be applied, because it would create an estate forbidden by law.

There are other facts in the case distinguishing it from the present, but it is not necessary to pursue them. It is sufficient that the Court held, not that *Shelley's Case* was not law, but that the case was not within it.

The very gist of the rule is, that if by the terms of the will, or other conveyance, it is provided that the estate should pass in the line of hereditary succession, or according to the laws of descent, the ancestor will take the whole estate. And, therefore, wherever the word "heirs" is used in a general sense, and not in a special or restrictive sense, to designate certain particular individuals, the whole estate vests in the ancestor, notwithstanding the language of the conveyance limits him to a life estate. (4 Kent's Com. 226.)

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In *Horne v. Lyeth*, 4 Harris & John., Maryland, 431, it was held that a devise of a term for ninety-nine years to A. during her natural life, and after her death to her heirs, vested the entire interest in the term in A.

The Court say that the word "heirs," when used alone, without explanation, is always a word of limitation, and not of purchase, and no presumed intention will control its legal operation. (*Stewart v. Kenower*, 7 W. & S. 288; *McFeely v. Moore*, 5 Hammond, 465; *King's Heirs*, 12 Ohio, 390; 5 Conn. 100; 3 Edw. Ch. 1.)

By the Court, CURREY, J.

This action was brought to recover damages in the sum of twelve thousand dollars for the breach of a covenant of seizin contained in a deed of conveyance of a parcel of land in the City of San Francisco, executed by the defendant to the plaintiff.

Elizabeth L. Townsend was the owner in fee of the land described in the deed, and made her will, devising it to Dr. Van Canaghen and to her son, John Henry Townsend, and to her brother, Moses Schallenberger. She died in December, 1850. The devise was in the following words:

"I bequeath to Dr. Van Canaghen one third of my property on California street, and one third to my son, and one third to my brother, each and all of them to have and to hold their lifetime, and then to go to their heirs and assigns. But never to sell it."

The devisees conveyed the premises to the defendant by deed purporting to grant the same in fee, and the defendant in November, 1861, conveyed the same premises to the plaintiff for the consideration of twelve thousand dollars, by deed, in which was contained a covenant of seizin. The question submitted to the Court below was, whether the devisees named took under the will only a life estate in the premises or an estate in fee simple absolute. The Court held that they took

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an estate in fee simple, and gave judgment for the defendant. Whether the Court was correct or not in its construction of the devise set forth is the only question involved in the case.

The doctrine declared in *Shelley's Case*, 1 Coke R. 93, is that where an estate of freehold is limited by gift or conveyance to a person for life, and in the same gift or conveyance there is a limitation, mediate or immediate, to his heirs, or the heirs of his body, the word *heirs* is a word of limitation of the estate, and not of purchase; by which, says Mr. Preston, it must be understood that it is not a designation of persons to take originally in their own right. (1 Preston on Estates, 264.) The rule in *Shelley's Case*, as it is called, Chancellor Kent says, has been established as an axiom in the English law for near five hundred years. (4 Kent's Com. 218.) "The principle of this rule," says Mr. Jickling, "is of much greater antiquity than the name, the former being virtually recognized in the Year Book of 18, Ed. II (1325), the latter not adopted till after the determination in *Shelley's Case*, 32 Eliz. (1590), in which the subject was incidentally discussed." (Jickling on Legal and Equitable Estates, 281.) It has generally been considered as of feudal origin, and introduced to prevent frauds upon tenure (1 Fearn on Contingent Remainders, 113); but Mr. Hargrave, in his observations concerning the rule, considered it as one of the barriers provided by law to guard descent from being confounded with purchase. (Hargrave's Law Tracts, 574, 575.)

In *Perrin v. Blake* in the Court of Exchequer, Mr. Justice Blackstone held it by no means clear that the rule took its rise merely from feudal principles; he was rather inclined to believe it was first established to prevent the inheritance from being in abeyance, and that one principle foundation of it was to obviate the mischief of too frequently putting the inheritance in suspense or abeyance. Further he said "another foundation might be and was probably laid in a principle diametrically opposed to the genius of the feudal institutions; namely, a desire to facilitate the alienation of land and to throw it into the track of commerce one generation sooner, by

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vesting the inheritance in the ancestor, than if he continued tenant for life, and the heir was declared a purchaser." That the decisions of Courts were influenced by this additional consideration suggested by Mr. Justice Blackstone, has been doubted by high authority, because in the early years of the common law it was the fruits of the tenure rather than the power of alienation, that engaged the attention of the Courts. (1 Preston on Est. 307.) But in modern times the principle suggested has gained ground, and it may be said the tendency of modern decisions has been to discourage and discountenance every contrivance having the effect to operate in restraint of the free alienation of property, or to divert it from the regular course of descent. What may have been the origin of the rule, it is not particularly important to inquire for the determination of the question before us. It is enough that we are satisfied that it has been a settled rule of property in all countries where the common law has been and is in force as the law of the land; and being thus satisfied, our duty is to ascertain if the case in hand comes within or falls without the rule, and to decide accordingly.

In the application of this rule to deeds of conveyance, it has been generally held of more absolute control than when applied to wills. (4 Kent Com. 216; 1 Preston on Estates, 271; 2 Fonb. Eq. 70.) It is certain, says Mr. Butler (Coke Litt. Sec. 719, note 1), that no rule of law has a more ancient origin, or is more generally established, than that if a testator expresses his intention defectively, either by not using technical and artificial terms, or by using them improperly, yet if his intention can be collected from his will, the law, however defective his language may be, will construe his words according to his intentions; and if the object of it is warranted by the established rules of law and equity, will admit of its full operation and effect. It is equally certain, on the other hand, that if the testator's intention appears to be to effect that which the rules of law and equity do not admit, neither the Courts of law nor the Courts of equity can allow its operation. The first thing, therefore, to be ascertained is, what the

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object of the testator is; the next, whether it is such as the rules of law and equity admit. In *Perrin v. Blake*, 4 Burr, 2,579, Lord Mansfield said, the rule is not a general proposition subject to no control, where the intention is on the other side, and where the objections may be answered. And he agreed with Justices Wilmot and Aston, that the intention is to govern, and that *Shelley's Case* does not constitute a decisive uncontrollable rule. Mr. Preston says the most strenuous advocates for a proper and legal application of the rule must admit, that the intention is to be collected, and if clearly expressed, to be observed. After the intention is fixed, the law decides on the gift; allowing the intention to govern as often as it is clear that the word *heirs* is not used as descriptive of the class of legal successors, but in designation of an individual or of particular persons. The intention to be observed in exclusion of the rule must be expressed in terms manifestly exhibiting to the mind clear evidence that the heirs are not to take merely in that right, and as answering that description. The inquiry must be directed to discover the intention, and to see whether the gift is clear of the reasons on which the rule depends for effect; for as Lord Hale very pertinently observed, in *King v. Melling*, in reference to wills, the intention is to be law to expound the testament. "The true ground of decision is the intent, and the true question is, what is the intent? and the interpretation is to show the intent." (1 Preston on Estates, 275.)

The intention, it is to be remembered, is to be sought for not only by consulting the words of the will, but also by the rules of interpretation, which have been from time to time adopted by Courts of law for its ascertainment. (1 Sum. 239.) In *Hodgson v. Ambrose*, 1 Doug. 337, Mr. Justice Buller observed, in a case involving the construction of a will: "There is no rule better established than that the intention of a testator, expressed in his will, if consistent with the rules of law, shall prevail." Mr. Preston, in commenting upon the words "if consistent with the rules of law," says these words are applicable only to the nature and operation of the estate

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or interest devised, and not to the construction of the words. The question whether the intent be consistent with the rules of law or not, can never arise until it is settled what that intention was. This can only be discovered by taking the whole together. (1 Preston on Estates, 276.) It is not sufficient that the intention should depend on inference or presumable reasons; it must be manifested by words which are explicit; by words which, without any infringement of the rule in *Shelley's Case*—at least the reason and spirit of that rule, if not its literal terms—may be construed to be a designation of particular persons. (1 Preston on Estates, 279:.) At common law, a devise of an estate to heirs which they would have taken by descent, was void, and the heirs took as heirs and not as purchasers. (2 Wash. on Real Property, 136, 268.)

In *Jones v. Morgan*, 1 Brown's Ch. Cases, 219, Lord Chancellor Thurlow described the outlines of distinction applicable to all the cases in which the rule in *Shelley's Case* had been subjected to judicial and forensic scrutiny. He drew an inference from all the cases, that where the estate is so given, that after the limitation to the first taker, it is to go to every person who can claim as heirs to the first taker, the word *heirs* must be a word of limitation—that all heirs taken *as heirs* must take by descent. His lordship said he thought the argument immaterial that the testator meant the first estate to be an estate for life. He took it, that in all cases the testator did mean so. He rested it on what the testator meant afterwards; if he meant that every other person who should be heir should take, he then meant what the law would not suffer him to give, or the heir to take as a purchaser; and further he said, all possible heirs must take as heirs, and not as purchasers; that in all cases where the limitation of an estate of freehold to a man and afterward to the heirs of his body, whether general or special, so as to give it to the heirs as a denomination or class, the heirs shall be in by descent and not by purchase.

Mr. Fearne, after having given to the subject a thorough

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and masterly examination, in which he noticed especially the decision of Lord Thurlow in *Jones against Morgan*, denominating it "very high authority," said: "Now, if the inference I have drawn from the very operative tendency of the law to hereditary descent, in its mode of approaching it, where the requisite ground for its accomplishment is wanting, be just; if from such premises, unopposed by any single repugnant decision or judicial opinion, the conclusion that the capacity of an heir to take the inheritance by purchase, so as to transmit it through the same line as by descent, is confined to those cases only where the ancestor takes no estate of freehold, be sufficiently founded, Lord Thurlow's doctrine embraces the subject to the full extent of his expression. For then, whenever the ancestor takes the freehold the inheritance will not go to all the heirs, etc., in the course of inheritable succession, unless by an actual descent; and consequently, if after the first taker it is to go to every person who can claim as heir to him, the intended succession can only be effectuated by taking the word *heirs*, etc., as words of limitation. If after him all heirs, etc., are to take as such—that is, as answering that description, they can take only by descent. If the law will not admit of all possible heirs, etc., taking the inheritance after its inception by a freehold in the ancestor otherwise than by descent, it follows that wherever the limitation to the heirs, etc., after a freehold to the ancestor is admitted to reach the whole denomination or class of heirs described, they must take by descent and not by purchase." (1 Fearne's Cont. Rem. 308.)

The principle upon which the rule in *Shelley's Case* is founded being understood, it is next necessary to ascertain if the devise under consideration comes within the rule. The devise was to the three persons named in the will, with the *habendum* "each and all of them to have and to hold their lifetime, and then to go to their heirs and assigns," with the superadded words "but never to sell it." The words "their heirs" do not designate particular persons, but is a *nomen collectivum*, comprehending the whole succession of heirs, lineal

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and collateral, of the three devisees. Here there is not even a limitation to the heirs of the body of each of the devisees, and if it were possible to construe the words "their heirs" as meaning the heirs of their bodies, even then they could not be held a *designatio personarum* without superadded words of enumeration showing clearly and unequivocally that the testatrix intended they should take in remainder an estate in fee in the premises in the character of purchasers and not in the character of heirs of her immediate devisees, and that they should constitute the root of a new inheritance—the stock of a new descent. In the cases wherein it has been held that a devise to one for his life with remainder to the heirs of his body, did not fall within the rule in *Shelley's Case*, there were superadded words of unquestionable intent controlling the direction of the property devised. For example, where the devise was to A., and the issue of her body lawfully to be begotten, as tenants in common, if more than one, but in default of such issue, etc., devise over, it was held that A. took a life estate only, and the limitation to her children was a contingent remainder to them in fee as purchasers. (*Davy v. Burnsall*, 6 Term R. 30.) There are many cases to be found in the books proceeding upon the principle that where there are superadded words, clearly and unequivocally expressing the intention of the testator to invest the first taker or immediate devisee with an estate for life only, with remainder in fee to the children or issue, or heirs of the body of the tenant for life, the intention shall be carried into effect, provided it be not inconsistent with the rules of law so to do.

In *Doe v. Jesson*, 5 Maule and Selwyn, 95, the devise was to W. for life, and after his decease to the heirs of his body lawfully issuing, in such proportions as he should appoint, and for want of such appointment then to the heirs of his body lawfully issuing, share and share alike as tenants in common, and if but one child the whole to such only child, and for want of such issue, then to the testator's right heirs forever. The testator died and W. entered, and afterwards married and had issue. It was held by the Court of King's Bench that W.

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took only an estate for life, and that his children also took only an estate for life; but on writ of error to the House of Lords, where Lord Eldon and Lord Redesdale both delivered opinions, the judgment of the King's Bench was reversed. Lord Eldon placed his judgment on the ground in part at least, that the words of devise to W., for and during his natural life, followed by the words of the devise to the heirs of the body of the said W. lawfully issuing, constituted W. tenant in tail of the freehold, notwithstanding the testator had before given an estate expressly to W. for his natural life only; and his lordship said "in order to cut down this estate tail, it is absolutely necessary that a particular intent should be found to control and alter it, as clear as the general intent here expressed," and he then proceeds, "the words 'heirs of the body' will indeed yield to a clear particular intent, that the estate should be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible and unequivocal"—and further on he says, "the heirs of the body" comprehend all the posterity of the donee in succession. The conclusion to which he came was that no such intent was clearly and unequivocally shown in the superadded words, but on the contrary that the words "for want of such issue" showed that the issue were to take in succession as heirs of the body and not as a mere description of persons. Lord Redesdale in the same case said, "It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression or necessary implication;" and the result of his opinion was that by "heirs of the body" the testator did not mean children alone. In conclusion he said, "if the testator had considered the effect of the words he used, and the rule of law operating upon them, he would have used none of the words in the will." (*Jesson v. Wright*, 2 Bligh, 50, 59.)

The words of the will under consideration do not manifest a clear and unequivocal intention on the part of the testatrix to give to the devisees named therein merely a life estate in the

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premises; nor does it appear that the words "their heirs" were intended as a designation of particular persons who should take an estate in the lands mentioned otherwise than by descent as heirs of their respective ancestors—the first takers under the will. If the words "each and all of them to have and to hold their lifetime and then to go to their heirs and assigns," could be interpreted as a clear and unequivocal expression of the intention of the testatrix to create in the first takers under her will a mere life estate in the premises, and a remainder in fee to their heirs, whoever they might be when the life estate should expire, then before such intention could be carried into effect, it would be necessary to determine the words, "their heirs," to be a *descriptio personarum*. But to do so would be in violation, as we have seen, of settled principles of law, as well as in disregard of the definition of the term "heirs" in its general and accurate legal sense. That the testatrix intended the estate devised to go to the devisees, whom she named as the immediate recipients of her bounty, in fee, seems to us more than probable from the entire language which she employed as an expression of her will. She did not stop with the word "heirs," but added the words "and assigns." We are not at liberty to disregard these added words while seeking for the testatrix's intent. The devise to the persons designated, to have and to hold their lifetime, and then to go to their heirs and assigns, is in substance the same as if the words "to go" had been omitted, because in either case, the estate could not go to the heirs of the immediate donees until there could be heirs to them, to take. No person can become an heir to his ancestor while his ancestor lives. *Nemo est hæres viventis*.

If it is to be presumed the testatrix had in mind any particular object in the use of the word "heirs," it is legitimate to suppose she meant it should have its settled legal effect, as associated with the essential words of devise which she used, which was to transmit to her devisees an estate in fee in the premises. To pass an estate of inheritance or an estate in fee simple absolute to the devisees named, it was necessary to use

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the word "heirs" or its equivalent; for if at the time of her death land was given to a man forever or to him and his assigns forever, without the use of the word "heirs" it vested in him only a life estate (2 Black. Com. 107,) and because this was then the law of the land a reason is apparent for the use of the term "heirs" in the devise.

On the part of the appellant some reliance is placed on the *habendum* "to have and to hold their lifetime," as evidence of the design of the testatrix to invest them with a life estate merely. This, to one ignorant of the law, might produce the impression at least that she so intended. But if she herself had any idea of the force and effect of the language of the devise as a whole, she must have known that the devisees named would take the estate in fee as soon as she should cease to live, and that the words "but never to sell it," coupled with the previous words, would not avoid such consequence. It is not improbable that she desired her devisees to retain the property she was providing to give them, so long as they might live, but that she wished to invest them with a life estate only is not supported by the words of the will, nor is there any evidence which is sufficient to satisfy the law that she intended to create an estate in remainder contingent upon the existence of heirs of her immediate devisees when death might put an end to their tenure.

Judgment affirmed.

CHARLES McLAUGHLIN v. CESAR PIATTI, LIBERATA PIATTI, AND DANIEL MURPHY.

SALE OF CHATTELS.—If goods are sold (while mingled with others) by number, weight, or measure, the sale is incomplete, and the title remains in the seller until the bargained property is separated and identified.
IDEM.—A sale of a chattel cannot apply to any article until it is clearly designated, and its identity ascertained.

SALE OF A GIVEN NUMBER OF CATTLE RUNNING IN A LARGER HERD.—A sale of a given number of cattle, then running in a herd of a larger number, is an executory contract, and does not apply to any particular cattle until the number sold have been separated from the herd.

Argument for Appellants.

BILL IN EQUITY TO ENFORCE SALE OF PERSONAL PROPERTY.—As a general rule Courts of equity do not enforce the specific performance of contracts for the sale of personal property. When such contracts are enforced by Courts of equity, it is not upon the ground of the insolvency of the defendant, but because the character of the property is so peculiar in itself, or its connection with the complainant's business is such that no adequate damages could be given at law.

IDEM.—A bill in equity will not lie to enforce the specific performance of a contract for the sale of cattle not possessing any especial value, except as merchandise.

ACTION FOR CLAIM AND DELIVERY OF PERSONAL PROPERTY.—The action for the "claim and delivery of personal property" under our practice, is at least commensurate with the action of detinue at common law.

BILL OF SALE OF PART OF A HERD OF CATTLE.—A bill of sale of a given number of cattle—part of a herd running on the seller's ranch—giving the purchaser the right to select the number sold and take the same immediately, gives to the purchaser the right, after demand and refusal, to recover possession of the entire herd in an action at law, and then select the number purchased, and return the residue to the seller.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

Hoge & Wilson, and *William T. Wallace*, for Appellant *Murphy*, and *S. O. Houghton*, for Appellants *Cesar* and *Liberata Piatti*.

This bill is brought to enforce the specific performance of an *executory contract*, for the sale and purchase of personal property, to wit: five hundred head of cattle, to be selected by the purchaser out of a much larger herd.

It appears upon the face of the bill, and is so found by the referee, that the five hundred head were not, at the time of the alleged contract, and have never been selected or segregated from the main herd of which they were a part. No property or interest whatever in any specific cattle passed, therefore, to Baker, under whom the complainant claims.

The contract is executory. The complaint is based entirely on the complainant's right to a specific performance of that contract as alleged. If this were not so, we should be at a loss to know for what purpose he has sought the aid of a Court of equity. The ordinary remedies at law would afford him, otherwise, all the relief desirable, inasmuch as upon his

Argument for Appellants.

own showing upon the face of his bill, the property was in the possession of the Piattis at the time of the execution of the contract, and so remained at the commencement of the suit and the rendition of the decree. The whole form and theory of the bill and its prayer, manifest its character and purpose.

That this contract is merely executory, and that no property in any specific cattle passed under it to Baker, (if such a proposition needs authority,) we cite the cases of *Crowfoot v. Bennett*, 2 Coms. 258; *Hutchinson et al. v. Hunter*, 7 Barr's Penn. R. 140, and cases there collected; *Wood v. McGee*, 7 Ohio, 467 (side paging 127); *Simmons v. Swift*, 5 Barn. & Cress. 857 (11 E. C. L. 712); Story on Sales, pp. 197, 198, and following — 271 and following.

We think we may safely assert that no Court of equity has ever decreed the specific performance of an executory contract for the sale of mere personalty, of the nature and description of the one set up in the complaint in this case.

The cases in which Courts of equity decree specific performance of contracts in relation to personal property are very rare and exceptional — and in all of them there were peculiar reasons for the interposition of equity; there was either no mode of getting at the damages in an ordinary action of law, or else the damages when recovered would not afford a complete and adequate remedy. (2 Story's Eq. Jur., Section 717, and following.)

Story, in the section above cited, lays it down that the true foundation of the rule for decreeing specific performance of any contract is, that "damages at law may not in a particular case afford a complete remedy."

The rule is not founded upon the idea that the party may not from the insolvency of the vendor be enabled to collect his judgment for damages, upon the breach of the contract, but that damages themselves when ascertained and collected would not afford a complete remedy; or in other words, because the damages, if ascertainable in a suit at law in the particular case,

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would from some peculiar quality or character in the thing itself, afford an inadequate remedy.

The general rule undoubtedly is not to entertain jurisdiction in equity for a specific performance of agreements respecting goods, chattels, stock, choses in action, and other things of a merely personal nature.

The exceptions to the rule, according to all authority, are rare and peculiar. The case made in this complaint falls within none of the exceptions. The property in question is stock—live stock—five hundred head of cattle—the value easily and certainly ascertained. Compensation in damages for the breach of such a contract, or for a failure in either party to carry it out, would furnish a complete and satisfactory remedy. To hold such a case as this not to be within the rule would be to obliterate the rule itself with its exceptions.

The only ground for appealing to equity for relief is an alleged inability on the part of the defendant, Cesar Piatti, to respond in damages, and that denied by the defendant Murphy, not proved, and not so found by the referee. This is sometimes a ground for *injunction* to restrain a trespass, but even then a very doubtful one. The opinion of Chancellor Kent in *Watson v. Hunter*, 5 John. Ch. R. 172, etc., being the other way.

A Court of equity may very well restrain an irresponsible person, in a case of tort, from committing irreparable injury—from the very destruction of the estate involved. (*McMillan v. Richards*, 9 Cal. 419.) The doctrine has no application to a case of this character. If a want of pecuniary responsibility in a Court of law were a ground of equity jurisdiction in cases of bills for the specific performance of agreements, it is strange that the text books and adjudged cases are not full of it. The books do not attempt to place the equity jurisdiction in such cases upon any such ground. Indeed, such a doctrine would draw to equity the jurisdiction of all matters of contract, always supposed to belong to the exclusive cognizance of the ordinary Courts of law. The jurisdiction would be measured by and depend upon the solvency or insolvency of the parties,

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and equitable relief administered or refused accordingly. Even if the law was not clearly otherwise, the allegation in this case is altogether insufficient.

Cook & Hittell, for Respondent.

In regard to whether the contract was executed or not, we cite the case of *Clark v. Rush*, 19 Cal. 393, which, we think, fully decides the question. McLaughlin's assignor, having been placed in the actual possession of the property, was in a position to select his number from the whole herd; his having left temporarily before making such selection, and being refused permission to re-enter the premises, cannot put him in a worse condition than if he were in the joint possession with the Piattis. The moment he took such possession, it was possession of the entire herd. The Piattis had nothing further to do in the premises; the contract was fully executed on their part. (*Pooley v. Budd*, 14 Beav. 34.) The doctrine that no property passes so long as anything remains to be done, does not apply, nor can a case be found making it applicable in a case like the present. The reason for the rule does not exist in this case, and the contract having been thus executed, could not, by the wrongful acts of the Piattis, be exchanged to an executory contract. The facts stated in the complaint in this action are the usual facts stated to procure a partition of personal property, as contradistinguished from a specific performance.

What difference can it make to the appellants' rights that Baker did not segregate the cattle? It is true that his agent was let into joint possession of the main herd; but it does not anywhere appear in the case, as the late opinion would seem to imply, that an offer or opportunity was given him to select the five hundred head, and certainly no offer was ever made to McLaughlin. The truth of the matter is exactly what it would be in any other case where a person is owner of the undivided portion of a chattel, or rather owner of an undivided certain number of a larger number of chattels, and wants a partition. He is entitled to a partition, and the common law

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is not pliant enough to afford him an adequate remedy. The adverse party in possession is, in a sense, a *trustee* for him, and he can enforce his equitable rights. (See 3 Parsons on Contracts, Boston, 1864, 364, note *t*; *Pooley v. Budd*, 14 Beav. 44; 7 Eng. L. & Eq. 229.)

Campbell, Fox & Campbell, also for Respondent.

The first question to be considered, is—was the contract which is the basis of this action an executory contract? To a limited extent, and perhaps we may say, in a purely technical sense, it was executory. But it seems to us, that in all these points wherein the defendants would have any just or legal right to intervene, it was an executed and not executory contract. It was certainly executed in so far as that the defendants had actually received the entire consideration of the sale made by them to our vendors. All the service which Baker was to render in consideration of the purchase of these cattle, had been rendered. It was executed in so far as that the defendants had deliberately, and in the most solemn manner, complied with all the forms of law in making, executing, and delivering the written evidence of the sale and of the transfer of the title to the property. It was executed in so far as that the defendants had actually delivered to their vendee the possession of the property sold—not the possession in severalty of the five hundred head of cattle, but the joint possession with them of the entire herd from which the five hundred head was to be taken. It was executed in so far as that the defendants, vendors of the property, had nothing further either to receive or to do in the premises. The only act undone, the only thing unexecuted, was the selection and severance of the five hundred head from the balance of the herd, and this was to be done, not by the vendors, nor by the joint action of vendors and vendee, but at the convenience of and by the vendee alone, who had been let into possession for that purpose, and to whom the right had been given to make that selection without let, hindrance, molestation, interruption, assistance, or choice of or from the vendors. Certainly this

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contract has been so far executed as that it was a perfect and binding sale and transfer of the title to the property.

But even if this contract is in any sense an executory contract, we insist that it is such an one as that its specific performance may properly be enforced by decree in equity, and that the circumstances are such as to give Courts of equity jurisdiction in the premises, and to entitle us to equitable relief. The fundamental principle which underlies the whole doctrine of specific performance is, that where a fair, *bona fide* contract has been so far executed, that by reason of its partial execution alone, or in conjunction with other changes which have subsequently taken place, the parties cannot be restored to their original condition or circumstances, or that the failure of one party to comply with its condition would *operate as a fraud* upon the other who was not in default, Courts of equity will interfere and decree a specific performance of the contract. The question as to whether or not the failure would *operate as a fraud*, enters quite as much into the consideration of the Court in determining the jurisdictional point as does the question whether or not the breach of contract can be compensated in damages. (See *Arguello v. Edinger*, 10 Cal. 150, where this subject is discussed at some length.)

By the Court, SHAFER, J.

This case comes into this Court by an appeal taken by the defendants from a decree of the Fourth District Court, rendered against them and in favor of the complainant.

The complaint sets out that on the 18th day of December, A. D. 1858, the defendants, Cesar Piatti and Liberata Piatti, were and ever since have been, husband and wife; that on that day they, for the consideration of fifteen thousand dollars, duly signed, acknowledged and delivered their bill of sale to E. D. Baker, as follows, viz:

"Know all men by these presents, that we, Cesar Piatti, and Liberata Piatti, his wife (late Levinia Bull,) for and in consid-

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eration of the sum of \$15,000 to us in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained and sold to E. D. Baker, to whom we make said acknowledgment of the receipt of said money, five hundred head of cattle, part and parcel of our stock of cattle now running on the Laguna Ranch, in Santa Clara County, to be selected and chosen by him or his agents out of said stock or herd, at his choice, hereby guaranteeing to him the right and possession thereof, and authorizing him to select and take the same immediately, fully and absolutely as of his own right and property.

"Given under our hands this 16th day of December, 1858.

"LIBERATA PIATTI,

"CESAR PIATTI.

"Witness: R. E. FULTON."

"STATE OF CALIFORNIA,
"County of Santa Clara, } ss.

"On this 18th day of December, A. D. 1858, before me, Thomas Bradley, a Notary Public in and for said county, personally appeared Cesar Piatti and Liberata Piatti, his wife, personally known to me to be the individuals described in and who executed the annexed instrument, as parties thereto, and acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned; and the said Liberata Piatti, wife of the said Cesar Piatti, having been by me first made acquainted with the contents of said instrument, acknowledged to me, on an examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she did not wish to retract the execution of the same.

"In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above mentioned.

[L. S.]

"THOMAS BRADLEY, Notary Public."

That by the terms of the bill of sale and as a matter of fact, they then and there sold said cattle to Baker, and he became the owner thereof.

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That on the 20th of August, A. D. 1859, by instrument in writing on the back of the bill of sale, transferred the five hundred head of cattle over to McLaughlin, the complainant, for five thousand dollars, of which instrument the following is a copy:

"For five thousand dollars value received I hereby assign and transfer and sell, and set over to Charles McLaughlin the cattle sold to me in and by the within bill of sale, and authorize him for himself to have, claim and keep the same in full ownership, having all the right of the same vested in me by the above bill of sale, without any recourse on me, on account of said sale or otherwise, which the said McLaughlin hereby accepts.

"August 24, 1859.

E. D. BAKER."

That at the time of the bill of sale, the five thousand head were and are now (to wit: at the commencement of this suit) part and parcel of a large herd of cattle of the same kind on Laguna Ranch, and were at the time of sale in possession of defendant, Cesar Piatti, as the separate property of said Liberata, and are now on said ranch occupied by said Liberata and Cesar, and in their possession.

That at the time of the execution of the bill of sale, the said defendants placed Baker in joint possession with them of the main herd, until a division of said main herd could be made, and said Baker could select and segregate said five hundred head; that Baker, by his agent, continued in such joint possession for about five months, when, after a temporary absence at San Francisco, said agent on returning was refused possession by the said defendants; that there has never been a segregation of said five hundred head from said main herd.

That at the time of the bill of sale, and since, the main herd was, and has been the separate property of the said Liberata, derived by her as a portion of the estate of a former husband, one Fisher, now deceased; that said defendant, Murphy, claims to be the owner of said five hundred head, by some

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pretended sale from said Liberata, but that the same is fraudulent and void; that said Murphy never paid anything for such pretended interest, but that it was a sham sale, made to hinder, delay and defraud creditors.

That the common property of Cesar and Liberata, and the separate property of Cesar, without the property in question, is insufficient to satisfy complainant's demands for damages, in case he cannot obtain a division of said main herd, and the delivery of said five hundred head, under the terms of the bill of sale and assignment; and that if complainant cannot obtain such division and delivery as aforesaid, he will suffer irreparable injury by reason of inability of defendant, Cesar, to respond in damages for breach of warranty in said bill of sale, and the non-liability of the said Liberata on the warranty, she being a married woman.

That, on refusing Baker's agent to re-enter into the joint possession as aforesaid, the said defendants have conspired and confederated to cheat and defraud the complainant, under pretense of said fraudulent sale to Murphy, out of said five hundred head of cattle and the equivalent thereof in damages; and that since the execution of the bill of sale, as complainant is informed, said defendants have sold about three hundred head of said herd, without the knowledge or consent of Baker or of complainant, and are endeavoring to and will sell the balance of the herd to innocent purchasers, etc.; that said ranch being in an isolated location and sparsely settled district, the said main herd may be easily driven off and sold to innocent purchasers during the pendency of this action, unless a receiver be appointed by the Court to take charge of such five hundred head, as may be selected and chosen by the complainant, and the defendants be restrained in the meantime from selling or otherwise disposing of said main herd of cattle; that at the time of bill of sale, and now, said five hundred head were and are worth fifteen thousand dollars; that on the 3d day of September, 1859, complainant demanded of Cesar and Liberata said five hundred head of cattle, as per terms of the bill of sale, they knowing of his ownership, and they

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refused and still refuse to deliver the same, and deny complainant's right to any portion of the same, although there were then and now are over one thousand head on hand of stock, out of which Baker had a right to select, and the same now remain on said ranch in the possession of said Cesar and Liberata; that Baker and the complainant have fully kept and performed the agreement on their part, and the said defendants Cesar and Liberata have wholly disregarded their covenants and agreements, etc.

That complainant is remediless, and can only be protected by the equitable interposition of the Court, etc. The complainant therefore prays that the main herd may be divided by the decree of the Court, and that he be adjudged to be the owner and entitled to the possession of five hundred head of cattle of said large herd on said ranch, to be selected and chosen by the complainant out of said main herd, and that said Liberata and Cesar be adjudged and decreed to specifically perform all and singular their covenants and stipulations as specified in said bill of sale, and for a receiver to take charge of five hundred head to be selected and chosen by the complainant, and in the meantime for an injunction, etc.; and that the Court decree the complainant to be entitled to and that the receiver deliver over to him such five hundred head of cattle, and that the injunction be made perpetual, and for such other relief, etc.; and also that the Court decree that the pretended sale to the defendant Murphy was fraudulent and void, and was intended to hinder and delay the creditors of the other defendants and to defraud this plaintiff, and that said Murphy has no interest in or to said stock.

Upon this bill and in pursuance of the prayer, a receiver was appointed, etc., and injunction issued, etc. The defendant Murphy demurred to the bill on the following grounds, viz:

"1. That this Court, as a Court of equity, has no jurisdiction of the subject matter of this action.

"2. That there is a defect of parties defendant; that is, in

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uniting the defendant with the defendants Piattis in an action for a specific performance of an agreement between the plaintiff and said Piattis, to which the defendant (Murphy) was not a party.

"3. That the plaintiff has not the legal capacity to sue this defendant to set aside the alleged fraudulent sale and conveyance to this defendant referred to in the complaint, because said plaintiff is a subsequent purchaser with notice, and because he is not a judgment creditor of said Piattis, or of either of them.

"4. That several causes of action have been improperly united, viz: a specific performance upon an executory agreement between said plaintiff and said Piattis, and to set aside an alleged fraudulent conveyance to this defendant.

"5. Because said complaint is multifarious, and unites separate and distinct grievances against separate and distinct persons.

"6. That the said complaint does not state facts sufficient to constitute a cause of action against any of said defendants.

"7. That said complaint does not state facts sufficient to constitute a cause of action against this defendant, either separately or jointly with said Piattis, or either of them."

The demurrer having been overruled, the defendants answered separately. The case went to a referee and on his special report of the facts judgment was entered for the plaintiff.

There is a diversity of questions raised by the record, all of which have been fully and learnedly discussed by the counsel of the respective parties, but the only points which we find it necessary to determine in order to dispose of the appeal upon its merits, are the following:

First—In our judgment the contract set up in the complaint was executory at the commencement of the action; that is to say, the plaintiff at that time had not, as the assignee of Baker, become the owner in severalty of any part of the herd of cattle mentioned in the bill of sale. It is a fundamental

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principle pervading everywhere the doctrine of the sales of chattels, that if goods be sold (while mingled with others) by number, weight, or measure, the sale is incomplete, and the title continues with the seller until the bargained property is separated and identified. The reason is that the sale cannot apply to any article until it is clearly designated and its identity ascertained. In the case under consideration, it could not be said with certainty that any particular five hundred head of cattle belonged to Baker or the plaintiff as his assignee, until a severance of that number from the herd from which they were to be taken. If a part of that herd had died, five hundred head surviving, the loss would neither in whole nor in part have fallen upon Baker. (*Hutchinson v. Hunter*, 7 Barr, 140; *Woods v. McGee*, 1 Ohio, 466; *Crowfoot v. Burnett*, 2 Comst. 258; Story on Sales, Sec. 296; *Horr v. Baker*, 6 Cal. 489 — 8 Cal. 603; *Adams v. Gorham*, 6 Cal. 68.) These principles are so well settled that no beneficial purpose would be subserved were we to pursue the discussion further.

Second — As a general rule, a bill in equity does not lie to enforce the specific performance of a sale of personal property. There are exceptions to the rule, but the case made by the plaintiff is not within them. The equitable jurisdiction to enforce specific performance in this class of contracts is not based either in whole or in part upon the accident of insolvency, but upon the general principle or truth that in the excepted cases there can be no adequate compensation in damages at law, the solvency of the defendant being given. This consequence sometimes results from the fact that the thing bargained for is of unusual distinction or curiosity, or from the fact that the commodities sold or contracted for are so related to the situation or to the business arrangements of the purchaser that non-fulfilment would greatly embarrass and impede him in his plans and prospects — threatening or involving a loss of profits which a jury could not correctly estimate; or to cases where the contract is not to be presently executed, and the like. (*Taylor v. Neville*, cited in 3 Atk. 384; *Adderly v. Dixon*, 1 Sim. and Stu. 610; 1 Sto. Eq. Juris., Sec. 718.)

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In this case the contract was to be, or at least might have been, executed by Baker immediately after it was concluded upon; and he furthermore had an opportunity to exercise his right of selection and segregation at the time when he was let into joint possession of the herd with the vendor. The cattle were without special value, in themselves considered, nor does it appear that if they had been segregated by Baker and taken into possession that they would or could have been put to any other than the most common uses. On the face of the complaint, as well as on the face of the referee's report, the cattle bargained for were in no manner distinguishable from merchandise at large. (*Buxton v. Lister*, 3 Atk. 382.) To uphold the judgment appealed from would therefore not only be in contravention of all the cases, but in subversion of the principles upon which the equity jurisdiction is founded.

Third—But while it is insisted on behalf of the respondent that, if the contract be as yet unexecuted, its full execution can be compelled in this proceeding, yet the chosen position of counsel is that the complaint discloses a contract fully executed—nothing remaining to be done either by vendors or vendee in order to vest a title in the latter to a band of five hundred head, distinguished and separate from the larger herd to which they originally belonged. As has been stated already, we do not consider that the complaint carries the contract which it sets forth, to that pitch in the matter of execution; and it results that in our opinion the complaint can be made to take on no other aspect than that of a bill brought to compel the specific performance of a contract for the sale of personal property, all the terms of which contract have not as yet been fulfilled—and here the jurisdictional obstacle, previously named, is encountered. But on the facts of this case, the plaintiff had a speedy and perfect remedy at law. The plaintiff, as the assignee of Baker, had the right to the immediate possession of the whole herd for the purpose of making a selection of his five hundred head. In pursuance of that right the defendants were requested to deliver the whole herd to the plaintiff, but refused so to do. We have here all the

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grounds upon which the action of detinue has been familiarly planted for ages. In that form of remedy the plaintiff could have recovered possession of the whole herd—selected his five hundred head from it and returned the residue of the cattle to the Piattis. Our action for the “claim and delivery of personal property,” considered as a remedy, is at least, commensurate with the action of detinue at common law. But if the plaintiff could not have availed himself of this remedy, and whether he could or not we have no occasion to decide, yet it is beyond controversy, that he could have maintained an action upon the contract for the recovery of damages, which relief would have been “adequate and complete” in the fulness of the meaning borne by those terms in equity law.

The view we have taken of the case makes it unnecessary to consider the other questions discussed by counsel.

The judgment is reversed and the Court below is directed to enter judgment in favor of the defendants.

Mr. Justice SAWYER expressed no opinion.

SOLANO COUNTY v. JOHN M. NEVILLE.

ACTION IN NAME OF COUNTY.—An action may be brought in the name of a county to recover money belonging to the General Fund of the county.

COMPENSATION OF TAX COLLECTORS.—The Legislature has the power to enact a law directing the Collector of Taxes for a county to pay one half of the compensation allowed him by law for the collection of the same into the County Treasury for the benefit of the General Fund.

APPEAL from the District Court, Seventh Judicial District, Solano County.

The following is the complaint to which defendant demurred:

“Solano County, plaintiff, by J. C. Hinckley, District Attorney, complains of John M. Neville, defendant, and for cause of action alleges that the said defendant, being Sheriff, and *ex officio* Tax Collector of Solano County, between the 17th day

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of August and the 16th day of November, A. D. 1863, collected a large amount of public revenue and taxes on property, to wit: the sum of \$86,578 87, and during the time aforesaid collected and received a percentage thereon, allowed by law as compensation for the collection of property tax, such percentage amounting to the sum of \$2,631 57.

"Plaintiff further shows that, by an Act of the Legislature of this State, entitled 'An Act to regulate the fees of certain officers in Solano County,' approved April 6, 1863, it was made the duty of said defendant, Sheriff and *ex officio* Tax Collector as aforesaid, to pay into the County Treasury of said county, for the benefit of the General Fund thereof, fifty per cent of the aforesaid compensation allowed by law for the collection of property tax, to wit, the sum of \$1,315 78½, and that no portion of said sum has been paid into said County Treasury, but that the whole thereof, by virtue of the Act aforesaid, is due and payable from the defendant to the plaintiff.

"Nevertheless, the said defendant, although often requested, has hitherto wholly neglected and refused to pay the same, or any portion thereof.

"Wherefore plaintiff prays judgment against said defendant for said sum of \$1,315 78½, with the costs, fees and charges allowed by law.

"J. C. HINCKLEY,
"District Attorney Solano County."

Judgment was rendered for the defendant, and plaintiff appealed from the order sustaining the demurrer.

The other facts are stated in the opinion of the Court.

J. C. Hinckley, for Appellant.

Swan & Hays, also for Appellant.

We beg leave to submit that the complaint contains "a statement of facts constituting the cause of action in ordinary and concise language," as required by the second subdi-

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vision of the thirty-ninth section of the Practice Act. That there is nothing uncertain, ambiguous, or unintelligible in the complaint.

"It is only necessary that the cause of indebtedness should be stated in such a manner as to apprise the defendant of the object of the suit." (*Milliken v. Murray*, 5 Cal. 245.)

We do not think it can be contended with any degree of earnestness that this complaint is deficient in any of the grounds named in the fourth ground of demurrer.

A writ of mandate would be a novel proceeding to recover money due, and we think there can be nothing in the point that no demand had been made of the defendant to pay the money over, because the law under which the suit is brought makes it the duty of the defendant to pay the money into the County Treasury.

As to the third ground of demurrer, "That the complaint does not state facts sufficient to constitute a cause of action;" assuming that the other grounds of demurrer are not well taken, we rely upon the law under which this suit is brought, and the facts as stated in the complaint, as showing a good cause of action.

The seventh section of the "Act to regulate the fees of certain officers in Solano County," reads as follows, to wit: "The Tax Collector shall receive the fees and compensation now allowed by law; but fifty per cent of the compensation allowed for the collection of property tax shall be paid by him into the County Treasury, for the benefit of the General Fund." Approved March 6, 1863. (Statutes of 1863, page 193.)

It will be observed that whilst the law does state that the Tax Collector shall receive the fees and compensation now allowed by law, it does not state that *he* shall be allowed that compensation; and it will also be observed that the law does not say that fifty per cent of *his* compensation for collection, etc., shall be paid into the Treasury, etc., but says *the* compensation allowed, etc., shall be paid into the Treasury, etc.

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Whitman & Wells, for Respondent.

We demur to the complaint, alleging: First — That the plaintiff, Solano County, hath not the legal capacity to sue, because the amount is given to a particular fund, to wit, the General Fund of the county. The Treasurer of the county is the legal custodian of that fund, and he alone can sue for moneys due it; or if the Board of Supervisors might maintain the action, the County of Solano, in its corporate capacity, is not empowered to bring the suit. (*Hunsacker v. Borden*, 5 Cal. 290.)

Nor is the County of Solano the real party in interest. The General Fund of the county is in the charge of the Treasurer, and is pledged in his hands for the debts that have been audited and allowed thereon. The holders of these debts, then, are the real parties in interest, and the Treasurer, as the trustee of an express statutory trust, is the person who should bring the suit.

But the more formidable objection is based upon the express provisions of the Act. Distinctly affirming, as it does, that the Tax Collector shall receive the fees allowed by law, it proceeds to enact that he shall pay them over to the General Fund, precisely as if it had stated that A. shall be entitled to recover all debts due him by the means now allowed by law, but that he shall pay fifty per cent of all debts received by him into a certain bank for the use of B.

It is objectionable, as taking the property of the Tax Collector and giving it to another. It directs his statutory rights, not on behalf of or for the benefit of the State, but of a stranger.

By the Court, RHODES, J.

The plaintiff sued the defendant to recover the one half of the fees allowed by law, as the percentage for the collection of the property tax in Solano County, which was received by him as Tax Collector, between the 17th of August and the

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16th of November, 1863. The defendant demurred to the complaint and his demurrer was sustained.

The first ground of demurrer now urged by the defendant is, that the plaintiff has not legal capacity to sue. This is answered by the Act of May 11, 1854 (Wood's Dig. 249), which provides that "suits brought for or against a county, shall be by or in the name of such county." The General Fund belongs to the county, and neither the Treasurer nor the Board of Commissioners can sue to recover moneys that are required by law to be paid into that fund, for neither they nor the creditors of the county have a direct interest in the fund.

The ground mainly relied on is that the Act of 1863 "is objectionable as taking the property of the Tax Collector and giving it to another." It is provided by section seven of the Act to regulate the fees of certain officers in Solano County (Stats. 1863, p. 193), that "the Tax Collector shall receive the fees and compensation now allowed by law; but fifty per cent of the compensation allowed for the collection of property tax shall be paid by him into the County Treasury for the benefit of the General Fund."

It is not surprising that the appellant finds it difficult to construct an argument in answer to the respondent's proposition, for when it is said that the whole matter of fees and compensation for the collection of taxes is subject to the control of the Legislature, and that by the section of the Act cited, the Tax Collector is entitled to retain for his services only one half of the compensation allowed by the general Revenue Act, and is required to pay into the General Fund of the county the remaining half, the argument is exhausted.

Judgment reversed and cause remanded, with directions to the Court below to overrule the demurrer, with leave to the defendant to answer the complaint according to the rules of said Court.

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THE PEOPLE *ex rel.* J. W. DICKENSON v. E. M. BANVARD.

STATEMENT ON APPEAL FROM A JUDGMENT.—A party who appeals from a judgment or an order, with a statement annexed to the judgment roll, must specify particularly in his statement the grounds upon which he intends to rely on the appeal.

MOTION FOR NONSUIT.—A party moving for a nonsuit should state in his motion precisely the grounds upon which he relies, so that the attention of the Court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case.

POWER OF LEGISLATURE OVER OFFICES.—The incumbent of an administrative office, created by the Legislature, may be legislated out of office pending the term for which he was elected.

JUDGMENT IN QUO WARRANTO.—In an action of *quo warranto* to determine the right to an office, where the relator claims the office as against the incumbent, the Court may not only determine the right of the defendant, but of the relator also; and if it determines in favor of the relator, may render judgment that the defendant forthwith deliver up to the relator the office.

APPEAL FROM A JUDGMENT.—On an appeal from a judgment, the appellate Court cannot consider the question whether the findings of fact are justified by the evidence.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The defendant was elected Treasurer of the County of Placer, at the general election in 1862, and afterwards qualified and entered upon the discharge of its duties.

By the law, as it then stood, his term commenced on the first Monday in December, 1862, and extended to the first Monday in March, 1865. By the Act of 1863, (see Laws of 1863, p. 387, Sec. 11,) it was provided that all county officers in every county of this State shall be elected at the general election in 1863, and of every second year thereafter, and shall hold their offices for the term of two years from and after the first Monday of March subsequent to their election.

At the general election held in September, 1863, defendant and relator were candidates for the office of Treasurer of Placer County, and relator received a majority of the votes and the certificate of election. The defendant refused to surrender up the office on the first Monday in March, 1864, and this action was commenced to try the right to the office.

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The Court found the following facts:

"At the general election in 1862, defendant was duly elected to the office of County Treasurer of said county for the ensuing term, which, as the law then stood, was for two years and three months from the first Monday in December, 1862.

"He duly qualified and entered upon the office at the commencement of the said term, and has held it ever since.

"The term under the law of 1862, if the same were now in force, would of course not expire until March, 1865.

"In 1863, under the recent amendments of the State Constitution, the Legislature passed an Act providing that all county officers throughout the State, including Treasurer, should be elected at the general election in said year, (1863,) that their terms should commence on the first Monday in March, 1864, and continue for two years; and repealing all former statutes conflicting with said Act. Under this latter Act, the relator, Dickenson, at the general election in 1863, was duly elected County Treasurer of said county. He received his certificate of election, took the oath, filed his official bond, and did all the acts necessary and required by law, in order to entitle him to enter upon the office. At the commencement of his term, on the first Monday of March, 1864, he demanded the office of the defendant, who refused to deliver it to him, but continues to hold it himself."

Upon these facts the Court rendered the following judgment:

"Wherefore, it is considered and adjudged that the said relator, J. W. Dickenson, is the lawfully elected and duly qualified Treasurer of said Placer County, and is entitled to use, hold, and exercise the said office, and perform the duties thereof, and to receive the emoluments thereof for two years, commencing with the 1st day of March, A. D. 1864, and that the defendant, E. M. Banvard, is guilty of usurping, holding, using, and executing the same, performing the duties and receiving the emoluments thereof unlawfully.

"And it is ordered, adjudged, and decreed, that the said

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defendant, E. M. Banvard, be and he is hereby excluded from the said office of Treasurer of said Placer County, and from exercising any of the duties pertaining thereto; and that he, the said defendant, do forthwith yield and deliver up to the said relator, J. W. Dickenson, the said office of Treasurer of said Placer County, and all of the books, papers, keys, furniture, property, rooms, documents, moneys, records, belonging or pertaining to the said office or the business thereof, and all and everything or things of whatsoever name or nature which may belong to the said office or the business thereof; and that the said relator have and recover of the said defendant, E. M. Banvard, his costs and expenses herein, taxed, at twenty-seven dollars and sixty cents, and that execution issue therefor."

The defendant appealed from the judgment, and annexed a statement of the evidence, exceptions, etc., to the judgment roll.

After the relator had closed his evidence and rested, defendant moved the Court for a nonsuit, without assigning in his motion the grounds on which he claimed it.

Defendant claimed as one reason for holding over, that relator's bond was insufficient, and on the defense offered two witnesses to prove that before relator filed his bond they told him it was insufficient, and did not comply with the statute.

Jo Hamilton, for Appellant.

The Act of 1863, eleventh section, meant nothing more than this: In the counties of the State a general election should be held in 1863, for State and county officers. The county officers elected to take office on the first Monday of March subsequent to their election. But in Placer County, which had elected its county officers under a special Act, and who had elected until the 1st of March, 1865, the law, while it gave to the officers elect the right to take office on the first Monday of March, 1864, did not oust the old officers, and if the election of county officers in Placer was valid at all under the Act of 1863, it gave to those officers elected no present right

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of office, because there was no vacancy in office; and at most, as two incumbents could not exercise the right of office at the same time, the persons elected in 1863 could not enter until the expiration of the term of those elected in 1862.

This is a reasonable construction of the Act of 1863, in its true meaning and intent. If it meant anything else, it was easy to have said the terms of officers elected in 1862 should close on the first Monday of March, 1864. But instead of so saying, it is wholly silent, leaving them undisturbed in the offices. Before any other construction could be put upon the law of 1863, we are forced to the conclusion that the Legislature intended to do and did do an unjust thing; for by no rule of fairness or justice could a whole year be taken from the term. By putting this construction upon the Act of 1863, it leaves the whole of the Act fairly and clearly intelligible.

Charles A. Tuttle, for Respondent.

The findings of the Court stand in the place of the verdict of a jury. (*Wheeler v. Hays*, 3 Cal. 285.)

In *Gagliardo v. Hoberlin*, 18 Cal. 395, the defendant brought up all the testimony, but made no motion for a new trial. The Court say: "In this case, no motion having been made for a new trial, the findings of the Court are conclusive as to the facts. * * * In the absence of such an application, the conclusions of fact must be deemed to have been properly drawn, and the matter cannot be regarded as open to investigation on appeal."

In *Deputy v. Stapleford et al.*, 19 Cal. 302, the same doctrine is affirmed.

In *Nelson & Nobell v. Highland*, 13 Cal. 73, the Court say: "No motion for a new trial having been made in this case, the finding of facts by the Court below is conclusive, and as this finding fully sustains the judgment, it is affirmed." (See *Leining v. Gould*, 13 Cal. 598.)

This rule has been applied to both legal and equitable actions. Mr. Justice Field, in *Duff v. Fisher*, 15 Cal. 380,

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says: "In this State the statute provides the manner in which the verdict of a jury, upon an issue submitted to its decision, may be reviewed—it is only by motion for a new trial."

By the Court, SHAFER, J.

This is an information filed by the Attorney-General on the relation of Dickenson, alleging that the defendant has usurped the office of Treasurer of Placer County, and that the office of right belongs to the relator. The appeal is from the judgment. We shall consider the errors alleged, in the order in which they are set down in the statement.

First—"The Court erred in refusing respondent's motion for a nonsuit." By the three hundred and thirty-eighth section of the Practice Act, a party who appeals from a judgment or order, with a statement annexed, is required "to state specifically the particulars or grounds upon which he intends to rely on appeal." This rule has not been complied with by the appellant, nor did he in his motions for a nonsuit disclose the grounds of it in the Court below. Most, if not all, the considerations upon which it has been held that a party, objecting to the introduction of testimony, should state precisely the grounds of his objection, are equally applicable to show, when a nonsuit is moved for at the trial, that the attention of the Court and of opposite counsel, should be particularly directed to the supposed defects in the plaintiff's case. We not only understand such to be the rule, but consider its observance a matter of much practical consequence. (*Mateer v. Brown*, 1 Cal. 221; *Kiler v. Kimball*, 10 Cal. 268; *McGarritty v. Byington*, 12 Cal. 429.)

Second—"The Court erred in refusing the testimony of Fellows and Spear." The respondent "offered to prove by each of these that each informed the relator, before the filing of his official bond, that the same was insufficient and did not comply with the statute and order of the Board of Supervisors." The testimony was objected to, and was excluded by the Court on the ground of irrelevancy. There was no

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error in this ruling. Assuming that the relator's bond was insufficient, the fact itself might be material; but any representations by third persons upon that subject, though made to the relator, would be immaterial.

Third — "The judgment of the Court was against law." There is but one question which, under the findings of the Court, we are at liberty to consider as within the purview of this objection; and that is, whether the Legislature has power to shorten the term for which a County Treasurer is elected — or more largely stated, whether an incumbent of an administrative office created by the Legislature, can be legislated out of office pending the term for which he was elected? The question is not an open one. It was met and decided in *People ex rel. Attorney-General v. Squires*, 14 Cal. 12.

Fourth — "The Court erred in ordering respondent to immediately vacate said office." By the three hundred and twelfth section of the Practice Act, the Court was authorized, not only to determine the right of the defendant, but to determine the right of the relator also; and, on the facts found, there can be no doubt that the judgment was correct on the point covered by the objection.

Fifth — "The testimony does not warrant either the findings or the judgment of the Court." It is inexact to say that a judgment is not warranted by the evidence. It may not be warranted by the pleadings, or the verdict, or the findings; and on demurrer to the evidence, or on motion for nonsuit properly made, it may be said that a judgment, entered for the plaintiff, is not warranted by the facts which the evidence tended to prove. The only point raised, then, by the objection now under consideration, is, whether the findings are justified by the evidence, and that question cannot be gone into under an appeal from the judgment. The testimony can only be reviewed on motion for new trial. (*Gagliardo v. Hoberlin*, 18 Cal. 395; *Deputy v. Stapleford*, 19 Cal. 302; *Allen v. Fenon*, ante 68.)

Judgment affirmed.

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ADELIA HILL v. J. M. SMITH.

FORM OF DENIAL IN ANSWER.—If an answer, in response to an allegation of the complaint, instead of denying it in express terms, contains the averment that the defendant did not commit the act charged, or that the fact alleged to exist does not exist, these averments of the answer traverse the matters alleged, and are good denials of the same.

PROOF OF MINING FOR GOLD.—Evidence that a party is at work on a claim, and is mining, and is at work with tools commonly used by miners, is sufficient to justify a jury in finding that he is mining for gold, without any proof that he has found any gold in the claim.

MINING ABOVE THE HEAD OF A DITCH.—Where a ditch has been excavated from the bed of a stream, and its water has been diverted through the same for mining purposes, a miner has no right to work a claim located above its head after the ditch is dug, in such manner as to mingle mud and sediment with the water, and injure its value to the ditch owner for mining purposes, or to fill up the ditch and reservoirs with the same so as to lessen their capacity and increase the expense of cleaning them out.

SAME.—The fact that a miner, working a claim above the head of a ditch, conducts his mining operations in such a manner as to cause the least possible injury to the ditch and water flowing in the same, does not excuse his responsibility for injuries caused by working the same. It matters not how cautiously or carefully the miner works, for if the ditch owner is in fact injured, the miner is none the less liable.

USE OF WATER FOR MINING.—As between ditch owners and miners using the waters of a stream in the mineral region for mining purposes, the law does not tolerate any injury by one to the prior rights of the other.

COMMON LAW.—The reasons which constitute the groundwork of the rules of the common law touching water rights have not lost their governing force in the mineral regions of this State. The conditions to which we are called upon to apply those rules are changed rather than the rules themselves.

PRIOR AND SUBSEQUENT APPROPRIATORS OF WATER.—In controversies in the mining regions between the prior and subsequent appropriators of water, the question to be determined is, has the use and enjoyment of the water, for the purposes for which the first appropriator claims it, been impaired by the acts of the subsequent claimant?

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

This action was commenced May 26th, 1863. The complaint averred the excavation of a ditch for the conveyance of water for mining purposes from Indian Cañon to Iowa Hill, by plaintiff's grantor, in 1852, and the continuous use of the water of the cañon in the ditch from that time up to the commencement of the suit; and that at the time the ditch was dug the water flowed down in a clear state, without any mixture of

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mud or sediment, and so remained until the acts of defendant complained of; and that the water, when in a clear condition, was more valuable and profitable to plaintiff for sale for mining purposes than when mixed with mud and sediment. That the defendant had been engaged for four weeks in digging up the bed of the cañon at points from six hundred to one thousand feet above the head of the ditch, and washing down the earth with the water into the ditch, thereby mixing the earth, mud, and sediment with the water, so that the same settled in the bottom of the ditch and reservoirs, and lessened their capacity and increased the expense of cleaning the same. That the miners who purchased the water from plaintiff, used the same through hose, and that when it was loaded with mud it destroyed their hose, etc., and that plaintiff's sales of water had been injured thereby.

The complaint prayed for judgment for damages, and for an injunction.

The answer did not deny in express language the allegations of the complaint, but in answer thereto stated that the waters of Indian Cañon had not flowed down in a clear state, and that defendant had not washed any earth into plaintiff's ditch, etc.

The defendant, on the trial, proved that he had located a claim above the head of the ditch a short time before the suit was commenced, and was engaged in working the same, but introduced no evidence to show that he had found any gold there. The evidence showed that the bed of the cañon above the head of the ditch was about one hundred feet in width, and that the earth was from three to four feet in depth, and that the defendant used the water of the cañon to work his claim, and that after the water left the claim it flowed into the ditch.

The Court gave the following instructions to the jury, to which plaintiff excepted.

"It is very difficult to state with exactness the rights of a ditch owner as against miners who subsequently locate claims on the same stream above the head of the ditch.

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Our Courts have endeavored to adopt those rules in relation to the subject which will allow, as far as possible, both these classes of location upon the public domain to enjoy their property. Of course, if the first locator of a water ditch upon a clear stream was held to be entitled to the continuous use of the water in a pure state, then large regions of rich mining country would be kept from settlement and development. On the other hand, if miners were allowed to locate claims immediately above the heads of ditches, and to mine there to the same extent and with the same rights as elsewhere, then large ditches, costing thousands of dollars, would be unjustly at the mercy of every adventurer.

“The rule in such cases, so far as any can be definitely stated, is this: The subsequent locators of mining claims on a stream above a ditch, which diverts water for sale to miners, have no right to work their claims, or run their tailings in such a manner as either to entirely obstruct the flow of water into the ditch, or to obstruct it to any considerable extent, or to diminish the quantity of water belonging to the ditch, or to so deteriorate the quality of the water as to render it unfit for mining purposes, or to so fill up the ditch with sediment as to materially lessen its value; but the mere fact that their mining operations *muddy* the water, rendering it less valuable, though not unfit for mining purposes, or deposit sediment in the ditch to only such an extent as may be easily removed, without great cost, does not render them liable in an action like the one at bar.

“If, therefore, in this case you believe from the evidence that defendant is the *bona fide* owner of mining claims on the stream above the head of plaintiff's ditch, that he worked his claims in a reasonable manner, using all due precaution to prevent injury to the ditch; that the effect of his mining was only to muddy the water, but not to diminish its quantity, or to materially injure the ditch or the water, then defendant is not liable. But if you believe defendant's mining operations seriously obstructed the flow of water into plaintiff's ditch, or diminished the quantity of water flowing

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into it, or in any manner materially injured the ditch or the water, then you should find for plaintiff, giving her nominal damages, of course, and such actual damages not exceeding three hundred dollars, as you believe from the evidence she sustained."

The defendant recovered judgment, and the plaintiff appealed from an order denying a new trial and from the judgment.

The other facts are stated in the opinion of the Court.

Tuttle & Fellows, for Appellant.

Jo Hamilton, for Respondent.

By the Court, SANDERSON, C. J.

The objection to the form in which many of the allegations contained in the complaint are denied is not a substantial one, in our judgment. Any form of denial which fairly meets and traverses the allegation is admissible. Suppose it is alleged in a complaint that the defendant at a certain time made and delivered to the plaintiff his certain promissory note, etc. Is not this allegation as directly and fairly traversed by saying: "I did not at the time specified, or at any other time, make or deliver to the plaintiff the note described in the complaint," as by saying: "I deny that on the day specified, or at any other time, I made or delivered to the plaintiff the note described in the complaint?" We think both serve equally well to form the issue. The former mode (which is the one adopted in this case) is less usual than the latter, but we are unable to perceive why it is not equally as good. It matters but little which form is adopted. If the denial is not evasive, but directly traverses the matter alleged, it is good, without regard to the mere form in which it is expressed. The denials in this case do not appear to be evasive, but on the contrary, we think they fairly meet the issues tendered by the complaint.

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We are also of the opinion that there is nothing in the point made by counsel for appellant to the effect that the matter set out in the answer by way of excuse or justification is unsupported by the evidence. Assuming that the jury must have determined at the threshold of their investigations that the digging by the defendant of which the plaintiff complained was done by him in good faith, in pursuit of gold, we think the evidence upon that point, in the absence of any counter testimony, was sufficient to sustain their finding. All the witnesses, including the plaintiff's, speak of the defendant's "claim," and of his labor as "mining." They also speak of his "sluice-boxes," "wing-dam," mode of "working claim" and "depositing tailings," all of which are familiar terms in the vocabulary of the miner, and would hardly have been employed by the witnesses had not the defendant been engaged in mining. From these circumstances, and in the absence of all counter testimony, the jury were justified in finding that the defendant was engaged in mining for gold. If they erred at all, it was not in so finding the fact, but in attaching to it, when found, too much importance, and regarding it as a justification on the part of the defendant, as they seem to have done, for whatever injuries he may have caused the plaintiff by his mining operations. And this brings us to the principal and most difficult question involved in this case.

After a careful examination of the evidence, we are impressed with the conviction that the plaintiff ought to have recovered. And we can only account for the verdict upon the hypothesis that the jury misapprehended the law of the case. The plaintiff's prior right is unquestioned. That the defendant's work caused large quantities of rubbish and sediment to be deposited in plaintiff's reservoir and ditches, thereby lessening their capacity and entailing upon her additional expense in cleaning them out and maintaining their original capacity, hardly admits of debate. And it is very clear from the evidence that the value of the water for mining purposes, by reason of the mud and sediment mixed with it by the defendant's mining operations was diminished by from one

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fourth to one half. It appears that the plaintiff's ditch supplied water to hydraulic claims which require water, as was clearly shown, in a purer state than claims worked by the sluicing process or method, in order to work them successfully. Where she had previously sold only sixty inches of water she was compelled to sell a hundred and a hundred and twenty at the same price in consequence of the deterioration of its solvent capacity by reason of the sediment and mud from defendant's claim. It further appears that on one or two occasions the miners, or some of them, who purchased water from the plaintiff, quit work entirely, because the water was so thick with sediment that it could not be used with any reasonable success in hydraulic mining. To say that such injuries are immaterial and therefore constitute no cause of action is to trifle with the prior rights of the plaintiff and misrepresent the law. There seems to have been a successful effort made on the part of the defense to prove that the defendant had studiously conducted his mining operations in such a manner as to cause the least possible injury to the water rights of the plaintiff. It is probable that the jury supposed that, having thus worked, the defendant was not responsible for injuries unavoidably resulting from his work upon the vague notion that everybody has a right to mine at such points as he may choose, provided he causes as little injury to others as is possible under all the circumstances. Such is the only theory upon which we can account for the verdict. Some stress was placed upon this testimony by the Judge, and while we think it was not intentional, the general and abstract terms in which the instructions of the Court were couched were, to a certain extent, as it appears to us, calculated to convey to the jury the idea that such was the law of the case. How cautiously or carefully the defendant worked was a matter of no consequence, for if his work in fact injured the plaintiff, he was none the less liable to an action. Moreover, the entire charge impliedly if not expressly proceeds upon and sanctions the idea that as between ditch owners and miners using the water of a stream in the mineral

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regions of the State for mining purposes, the law tolerates and winks at some uncertain and indeterminate amount of injury by the one to the prior rights of the other. This is due in a great measure doubtless to the notion, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this State upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is without any substantial foundation. The reasons which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves. The maxim, *sic utere tuo ut alienum non lædas*, upon which they are grounded, has lost none of its governing force; on the contrary it remains now, and in the mining regions of this State, as operative a test of the lawful use of water as at any time in the past, or in any other country. When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel — *ubi currere solebat* — without diminution or alteration, it does so because its flow imparts fertility to his land, and because water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditch owners, simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose, which is not only compatible with its diversion from its natural channel, but more frequently necessitates such diversion, and moreover does not require the water in a pure state in order to insure its reasonable and beneficial use. Yet the maxim above mentioned upon which the rule is founded is equally as applicable to the ditch owner and to the miner as to the riparian proprietor, and neither can so use the water as to injure or prejudice the prior rights to a like use by the other. This maxim is one which every riparian proprietor is bound to respect, and it is no less obligatory upon those who use and divert water for mining purposes. So that in all con-

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controversies like the present the question to be determined after all is the same as that presented by a like controversy between riparian proprietors, to wit: has the plaintiff's use and enjoyment of the water *for the purposes for which he claims its use* been impaired by the acts of the defendant? This is purely a question of fact for the jury, and all the law applicable to it is found, as stated by the learned counsel for appellants in the case of the *Phoenix Water Company v. Fletcher*, 23 Cal. 483, embraced in the three following maxims: *Qui prior est in tempore, potior est in jure; Ubi jus, ibi remedium; Sic utere tuo ut alienum non lædas*, and beyond these principles they do not require to be instructed. What diminution in quantity or what deterioration in quality will injuriously affect the use of the water by the plaintiff may be safely left to the determination of the jury, guided only by the foregoing maxims. It may be that a slight diminution or deterioration will impair his use of the water, and it may be that such use would not be impaired by a very considerable reduction in quantity or quality. The question must be determined *in view of the use to which the water is applied* and the other circumstances developed by the testimony.

Judgment reversed and new trial ordered.

THOMAS S. PAGE v. ISAAC HOBBS, WILLIAM F. WOOD, E. D. WOOD, JAMES LOCK, PETER OLOFSEN, JOHN FOWLER, JOHN J. FOWLER, AND HENRY LITTLE.

ENTRY ON INCLOSED PUBLIC LAND TO PRE-EMPT.—If the defendant in an action to recover the possession of land, justifies his entry upon the prior possession of the plaintiff on the ground that the land was public land, subject to the pre-emption laws of the United States, and that he entered in pursuance of said laws, with intent to pre-empt, occupy, and enter the land in accordance with the provisions of the same, it devolves on him to show that he is one of the persons entitled to the benefit of said laws.

RIGHT TO PRE-EMPT SUSCOL RANCHO.—A declaratory statement under the pre-emption laws in relation to land within the boundaries of the Suscol Rancho, made by one who was not a *bona fide* purchaser from Vallejo, at any

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time between March 3d, 1863, and October 15th, 1864, was of no effect. The Act of March 3d, 1863, withdrew said land from the operation of the pre-emption laws until October 15th, 1864.

WHAT PRE-EMPTIONER MUST PROVE.—One claiming to hold public lands as a pre-emptor, as against a prior possessor, must show that he is one of the class of persons entitled to pre-empt, and that he has performed the acts prescribed by the pre-emption laws, or the prior possession will prevail.

APPEAL from the District Court, Seventh Judicial District, Solano County.

Vallejo claimed the Suscol Rancho under a grant from the Mexican Nation. The Supreme Court of the United States rejected the grant in 1862. The plaintiff had purchased from Vallejo the land in dispute, which was a portion of the so-called Suscol Rancho, a long time prior to the rejection of the grant, and had entered into possession and inclosed the same.

In 1862, after the rejection of the grant, defendants entered, claiming the right each to pre-empt one hundred and sixty acres as public land. Plaintiff commenced this action on the 26th of November, 1862. March 3d, 1863, Congress passed an Act granting to *bona fide* purchasers from Vallejo the exclusive right to purchase at any time within one year after the plats of survey were filed in the Land Office. These plats were filed October 15th, 1863. Defendants' declaratory statements as pre-emptioners were filed in the Register's office on the 23d day of October, 1863. The trial was had February 3d, 1864.

The other facts are stated in the opinion of the Court.

M. A. Wheaton, for Appellants.

Whitman & Wells, for Respondent.

By the Court, SAWYER, J.

This action was commenced on the 26th day of November, 1862, to recover a portion of the tract of land known as the "Suscol Rancho." The plaintiff was one of the purchasers under the grant to Vallejo. He had occupied for a series of

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years, claiming title under said grant. Soon after the decision of the Supreme Court of the United States, rejecting the Vallejo grant in 1862, numerous parties, regardless of the inclosures or possession of those who had for years occupied under conveyances from Vallejo, entered upon various tracts of the land covered by the rejected grant. Among the parties so entering were the defendants, each of whom laid claim to one hundred and sixty acres. These entries were made sometime during the summer and fall of 1862, and prior to the institution of this suit.

The defendants answered separately, and in their answers severally alleged, that, at the time of their respective entries upon the lands in question, said lands were public lands of the United States, subject to the pre-emption laws of 1841 as subsequently modified and extended over the State of California; that they respectively entered upon tracts of one hundred and sixty acres each, and no more, under and in pursuance of said pre-emption laws, with the intent to occupy and enter the same in accordance with the terms of said Act, so soon as said lands should come into market.

The testimony, by consent of the parties, was taken by a referee and reported to the Court, and the Court tried the case without a jury upon the testimony thus taken.

The Court found:

Firstly — The plaintiff, on and for several years before the twenty-fifth day of October, had by himself and tenants, held the actual possession of the land described in the complaint, cultivating and using the same for the ordinary purposes of agriculture, farming and pasturage.

Secondly — That on or about said twenty-fifth day of October, A. D. 1862, the defendants entered upon said premises, and ousted and excluded plaintiff therefrom, and have from that time to the present withheld the same from him.

Also the value of the rents and profits, and the specific parts of which each was in possession, and rendered judgment accordingly. A motion for new trial having been made and

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denied, defendants appeal from the order denying new trial, and from the judgment.

Upon the facts found, the judgment is clearly correct, and the only questions are, as to the sufficiency of the evidence to support the findings, and as to the propriety of the rejection of certain evidence offered by defendants. Upon the first point, the testimony was clearly sufficient to establish the prior possession during several years of the plaintiff, and the entry and ouster by defendants. The testimony utterly failed to connect the defendants with the title of the United States, through the medium of the pre-emption laws. The pre-emption laws in force at the time, if any, were the Act of 1841, and subsequent modifications. The only qualification of the law of 1841 bearing upon the question is, that in California, unsurveyed lands were subject to pre-emption settlements; and the fact that a party had once before availed himself of the provisions of the Act in other States, did not preclude him from availing himself of its provisions again in this State. In other respects, the provisions of the law of 1841 were in force.

Under that Act, no person is entitled to settle upon the public land, with a view to pre-emption, unless such person is the head of a family, a widow, or one over the age of twenty-one years, the party being a citizen of the United States, or a person who has filed his declaration of intention to become a citizen, and he must "make a settlement in person," and must "inhabit and improve the same," and "erect a dwelling thereon." And, "No person who is a proprietor of three hundred and twenty acres of land in any State or Territory of the United States, and no person who shall quit or abandon his residence on his own land to reside on the public land in the same State or Territory, shall acquire any right of pre-emption under this Act." (Wood's Digest, 746, Sec. 10.)

In order to connect themselves with the United States under the pre-emption laws, it was necessary for the defendants to show that they were persons entitled under this Act to the benefit of its provisions. But there is not a shadow of testi-

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mony in the record tending to show that they, or either of them, were heads of families, single men over the age of twenty-one, or citizens, or persons who had filed their declarations of intention to become citizens, and no satisfactory evidence that they made "a settlement in person," and "inhabited the same." There is testimony that most of them built a shanty, or moved one on the land; but the testimony is that a portion of them lived in them, and a portion did not, and the testimony does not show which defendants lived on the land, or inhabited it, and which did not, except that it appears that U. F. Wood "never lived on the land." But as before stated, there is a total absence of testimony tending to show, that any one of these parties is within the provisions of the Act. It is not enough to show that they entered with an intent to claim under the pre-emption laws, without also showing that they were entitled to make a claim under such laws. The defendants having failed to connect themselves with the title of the United States through the medium of these acts, or otherwise, the evidence justifies the finding, and the prior possession of plaintiff must prevail.

The testimony of the defendants which was rejected, if all admitted, would not obviate this defect of proof, and could not therefore change the result.

But the certificate of the Register of the Land Office, that, on the 23d of October, 1863, the said several defendants filed their declaratory statements under the pre-emption laws, giving notice of their intention to claim the respective portions of the lands upon which they had entered, was inadmissible. These transactions took place nearly a year after the commencement of this suit, and at the time the said declarations were filed, the lands covered by them had been withdrawn from the operation of the law of 1841 (as we held in *Hastings v. McGoogin et al.*, ante 84,) by the Act of March 3, 1863. At this time, and for a year after the 15th of October, 1863—the day on which the plats of survey were filed—the plaintiff was the only person authorized by the Act of March

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8, 1863, to purchase these lands. There was no error in rejecting the certificate of the Register of the Land Office.

Under the views taken it is unnecessary to discuss the question as to the right of a person, for the purpose of acquiring a pre-emption right, to enter upon the actual possession of another.

Judgment affirmed.

Mr. Justice CURREY, having been consulted as counsel, did not sit in the case.

By the Court, SAWYER, J., on petition for rehearing.

Plaintiff recovered in this action on his prior possession, and not upon a claim under the Act of Congress authorizing those who had purchased under Vallejo to enter the lands reduced to possession under such purchases. The record, however, shows that plaintiff is one of the parties contemplated by the Act, he having reduced the lands to possession, and having been, for several years prior to the entry of defendants, in possession under conveyances from Vallejo. The question is not whether the defendants are under a disability, which must be shown by the party alleging it. They allege a right acquired under the United States, and the burden of showing the right is on them. The Government has not extended its bounty to mankind generally, but it has conferred a right upon a particular class of persons upon the performance of certain prescribed acts, and a party claiming the right must show that he is one of those persons, and that he has performed the acts required.

At the time the declaratory statement was filed by defendants, the lands were not subject to pre-emption by them, for it appears that the lands in question had been reduced to possession by plaintiff under conveyances from Vallejo, and that the time had not expired within which plaintiff had the exclusive right of purchase. It was not a matter of any consequence whether he had yet taken the steps to secure the land or not.

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The declaratory statement, made while the lands were not subject to pre-emption, was of no validity, and there is no sufficient evidence, independent of, or in connection with this declaratory statement, to connect the defendants with the United States Government prior to the commencement of this suit. The plaintiff's prior possession must, therefore, prevail.

As to the question of damages, it appears by the admissions of the parties in evidence, that plaintiff had taken possession of the crops in an action to recover them, but the suit was still pending and undetermined. We cannot know that he will recover. But there is nothing in the pleadings, that will enable us to take cognizance of the fact that plaintiff has brought an action to recover the crops, or that he has received the rents and profits. Besides, it appears in the record that the plaintiff has "remitted a portion of the damages." We presume this was to obviate the objection made by appellant.

Rehearing denied.

THE PEOPLE v. AH PING.

ENTERING HOUSE WITH INTENT TO STEAL.—The mere fact that one person is with another who enters a dwelling house and steals therefrom, and sees him steal without interference on his part to prevent it, does not render him guilty of the crime of maliciously entering a dwelling house in the daytime with intent to steal property therein, nor will the proof of such facts cast on him the burden of proving himself innocent.

APPEAL from the County Court, Sierra County.

The facts upon which the charge recited in the opinion of the Court was based were as follows:

Fellows and O'Farrell, two miners, who occupied a cabin, hired a Chinaman on a Sunday during their absence to watch their cabin, and placed him in the bushes about fifty feet from the same. The watchman saw Ah You and Ah Ping enter the cabin, and came up and found them inside putting flour and other articles of food into two sacks. Ah You took the

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sacks and carried them off. Ah Ping did not carry anything away, but went with Ah You. Ah You plead guilty, and was used as a witness by Ah Ping on his trial. He testified that he alone committed the offense, and that Ah Ping was innocent and was a stranger to him, whom he had accidentally met.

Defendant was convicted, and appealed.

The other facts are stated in the opinion of the Court.

Van Clief & Gear, and *J. M. Haven*, for Appellant, referred to Wood's Digest, 329; Wheaton's Am. Crim. Law, 120; Russell on Crimes, 27; 4 Black. 34; and Barb. Crim. Law, 283.

J. G. McCullough, Attorney-General, for the People, referred to Wood's Digest, p. 290, § 255; Id. p. 329, § 11.

By the Court, SHAFER, J.

Ah Ping, the appellant, was indicted jointly with Ah You under the Act of 1864 (Acts 1864, p. 104) for maliciously entering a certain dwelling house with intent to steal certain personal property therein. The question for the jury was the alleged breaking into the house with the intent charged. The Court charged, amongst other things, that "it is not necessary, to hold the defendant guilty of the offense charged against him in the indictment, that he be proved positively to have stolen something. If it be proved that he was with the one who did steal as charged in the indictment, and saw him steal without interference on defendant's part to prevent it, upon the defendant will then devolve the labor of proving himself innocent; otherwise he would be held guilty as an accessory. An accessory is an aider and abettor, and our statutes treat him as a principal, and subject to the same rules of law. An accessory is one who stands by and aids and abets and assists, or who counsels and advises the perpetration of a crime." This instruction is erroneous. The definition of the term "accessory" is correctly given, (Wood's Dig. 329, Sec. 11,)

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but it cannot be said that the facts, enumerated in the charge, would establish the guilt of the accused by legal conclusion. The appellant may have been in the house with one who was, himself, there, with felonious intent; he may have seen the latter in the act of committing a felony and have made no attempt to interfere, and still be entirely innocent. These facts, if found, would not necessarily have established the defendant's guilt, nor, what amounts to the same thing, would they have "devolved upon him the labor of proving himself innocent." If the facts, put hypothetically, were found, their effect would not be a question of law, to be passed upon by the Court, but of fact, to be determined by the jury. The charge was erroneous in other particulars, but the error already remarked upon requires that the judgment should be set aside. Judgment reversed and new trial ordered.

HENRY HEGELER v. GEORGE HENCKELL.

WAIVER OF RIGHT TO MOVE FOR NEW TRIAL.—If a statement prepared on motion for a new trial is not filed within the time prescribed by the one hundred and ninety-fifth section of the Practice Act, the right to move for a new trial is waived, and when such right is thus waived the Court has no power to restore it.

AMENDMENT OF ENTRIES OF CLERK OF COURT.—Clerical errors and misprisions with respect to entries of judicial proceedings may be corrected by the Court even after the adjournment of the term, but the record itself must show the error.

POWER OF JUDGE AT CHAMBERS.—A Judge at Chambers has no power to make an order directing the Clerk of his Court to enter in the minutes of the Court, *nunc pro tunc*, an order alleged to have been made in open Court.

ENTRY OF ORDER OF COURT *nunc pro tunc*.—A Court has no power, after the adjournment of a term, to direct the Clerk to enter in the minutes, *nunc pro tunc*, an order made at the adjourned term, where there is nothing in the record to show that such order was made.

ORDER GRANTING NEW TRIAL.—If the statement on motion for a new trial is not filed in time, an order granting a new trial for causes appearing in such statement only will be reversed by the appellate Court.

APPEAL from the District Court, Seventh Judicial District, Sonoma County.

The facts are stated in the opinion of the Court.

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Temple & Thomas, for Appellant.

The Court was not authorized to amend the record after the expiration of the term of the Court, without something in the record to amend by. (3 Cal. 255; 9 Cal. 351; 13 Cal. 107; *State v. Smith*, 1 N. & M. 16; *Smith v. Jackson*, 1 Paine, 486; *Bowman v. Green*, 6 Monroe, 341; *Probasco v. Probasco*, 2 Penn. 10, 12; *Marsh v. Berry*, 7 Cow. 344; 3 Cow. 43, and notes; *Waldo v. Spencer*, 4 Conn. 71; 2 Virg. Cases, 527; *State v. Harrison*, 10 Yerger, 542; *Groves v. Fulton*, 7 How. Miss. 592; *Bondurant v. Thompson*, 15 Ala. 202; *Ketchen v. Moya*, 16 Ala. 143; *Gibson v. Wilson*, 18 Ala. 63; *Metcalf v. Metcalf*, 19 Ala. 319, 605; *Hudson v. Hudson*, 20 Ala. 364; *West v. Galloway*, 33 Ala. 306, 553.)

George Pearce, for Respondent.

Every Court of original and general jurisdiction has and holds a revisory jurisdiction over the record of its own proceedings. (*Clapp v. Graves*, 2 Hilton, 317; *Key v. Robinson*, 8 Ind. 368; *Claggett v. Simes*, 11 Foster, 56.)

Section sixty-eight of the Practice Act authorizes the Court, in furtherance of justice, to amend any proceeding.

By the Court, CURREY, J.

Judgment was rendered in plaintiff's favor on the 16th of February, 1864, and thereupon the defendant gave notice of his intention to move for a new trial. The statement to be used on the motion was filed on the 5th of March following. On the 4th of June the defendant applied to the Judge of the Court at Chambers for an order directing the Clerk to enter in his minutes of the proceedings of the Court, as of the day when the judgment was rendered, an order staying proceedings in the cause and granting to the defendant fifteen days in addition to the time allowed by statute, within which to prepare and file a statement on motion for a new trial. This application was founded on the affidavit of the defendant's

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attorney, as well as upon the pleadings, proceedings and papers in the action. The defendant's attorney deposed that when judgment was rendered he asked and obtained of the Court fifteen days in addition to the time prescribed by statute, within which to prepare and file a statement on which to move for a new trial and a stay of proceedings in the meantime. That he drew up the order and procured the signature of the Judge thereto, and placed the same in the hands of the person then acting as the Deputy of the Clerk of the Court. That the Clerk and his Deputy, either through design, accident or mistake, had neglected entering the order made. One of the attorneys for the plaintiff made a counter affidavit, in which he stated positively that the additional time granted by the Court was made orally in open Court, and that it was ten and not fifteen days; that he knew nothing of any written order signed by the Judge, and that if such an order was so signed it was different from the one announced from the bench when the application for additional time was made. He also deposed that after the statement was filed, the defendant's attorney applied to the plaintiff's attorney, by letter, requesting them to stipulate to waive the consequences of his having failed to file in time his statement on motion for a new trial, and that they refused to comply with such request. The Clerk of the Court deposed that the written order, which the defendant's attorney mentioned in his affidavit, was never in his possession as Clerk or otherwise, and that after searching for it he had been unable to find it in the Clerk's office. It was in proof by affidavits that the Deputy Clerk referred to had removed from the county.

The motion, with the objections thereto, was heard by the Judge at Chambers. Upon the argument, the Judge informed the counsel of the parties that he did not recollect the order referred to in the affidavit of defendant's attorney, but would find the facts to be as therein alleged. At the same time the defendant moved, upon the statement filed, for a new trial, when the plaintiff objected, upon the ground, among others, that the defendant had waived his right to move for a new trial,

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because he had not filed his statement within the time prescribed by law, or the order of the Court, or the Judge thereof at Chambers. The case was then taken under advisement, and at the next term of the Court an order vacating the judgment and granting a new trial was made. From this order the plaintiff has appealed. The grounds of objection assigned are in substance as follows:

First—That the defendant waived his right to a motion for a new trial by not filing his statement within the time prescribed by section one hundred and ninety-five of the Civil Practice Act.

Second—That there was nothing in the affidavit of the defendant's attorney which took the case out of the provisions of said section.

Third—That the Court could not regard anything in that affidavit as evidence of the existence of the supposed order therein mentioned.

Fourth—That the Court was not authorized to amend the record after the expiration of the term of the Court without something to amend by.

Fifth—That the Court erred in granting the motion for a new trial.

It is not necessary to consider these objections *seriatim*. If the statement prepared by the defendant was not filed within some time for which the one hundred and ninety-fifth section of the Practice Act makes provision, then by the terms of that section the right to move for a new trial was waived, and when such right was waived the Court was powerless to rescue the case from the consequences of the defendant's default.

The order which the defendant's attorney deposes was made and signed, was not made a part of the record of the proceedings in the case at the term of the Court when the judgment was rendered, and the appellant maintains that the omission cannot be remedied by the Court after the term has elapsed. It is the duty of the Clerk to enter all orders made by the Court in the minutes of its proceedings, and the parties con-

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cerned should see to it that such orders are entered. Clerical errors and misprisions may occur in respect to enteries of judgments, orders, and other matters connected with judicial proceedings, which it is competent for the Court to order amended or supplied; and this may be done even though the term when the error or mistake happened may have passed, provided the party moving proceeds with due diligence. (*Swain v. Naglee*, 19 Cal. 127.) In this case it was not sought to amend an entry made, but to obtain an order empowering and directing the Clerk to enter in the minutes, *nunc pro tunc*, an order alleged to have been made in open Court. Such an order could not properly be made by the Judge at Chambers; and we cannot discover from the record that such order was made either at Chambers by the Judge or at any time by the Court; and therefore the case stands upon the naked question whether the Court committed an error in vacating the judgment and granting a new trial. The notice of application for a new trial was duly given, but the statement required was not filed in time to save and secure the right to move for a new trial. At the time the motion was made and when it was granted, the right to move for a new trial was gone, and the Court had no power to vacate and set aside the judgment.

Therefore the order vacating and setting aside the judgment and granting a new trial must be and is hereby reversed.

Mr. Justice SAWYER expressed no opinion.

WILLIAM T. WALLACE v. JAMES ELDREDGE. (No. 1.)

JUDGMENT AFTER DEFAULT.—The Clerk of a Court, in entering a judgment after default, acts in a mere ministerial capacity, and cannot render a judgment granting any relief beyond that warranted by the facts stated in the complaint.

ENTRY OF JUDGMENT BY CLERK AFTER DEFAULT.—If the note sued on is payable in money generally, and the complaint contains a copy of the same, the Clerk cannot, after default, enter a judgment payable in gold coin, although the complaint prays for such judgment.

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APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

Shafter, Gould & Duinelle, for Appellant.

Patterson, Wallace & Stow, for Respondent.

By the Court, RHODES, J.

The plaintiff commenced an action June 15, 1863, against Eldredge and others upon two promissory notes made by them to the plaintiff, the first of which is in the following form: "\$1,500.—San Francisco, September 26, 1860.—One year after date, for value received, we promise to pay to the order of William T. Wallace one thousand five hundred dollars, jointly and severally. John A. Collier, M. D. Ross, David Crawford, Jr., James Eldredge, by their attorney in fact, Hobart Eldredge;" and the second note is in the same form, except that it is made payable eighteen months after date. The plaintiff in his complaint prayed for judgment for the amount of the promissory notes, "in current gold and silver coin of the United States of America," with interest and costs of suit. Service of the summons was made upon James Eldredge alone, on the 20th of July, 1863, and his default was entered by the Clerk, August 3, 1863, and on the same day the Clerk entered up judgment by default for the amount of the notes, "in current gold and silver coin of the United States of America," together with interest and costs of suit.

The defendant appeals from the judgment, and the ground of his objection is that it is ordered and adjudged that the plaintiff recover the amount therein specified, in the current gold and silver coin of the United States.

It is provided in section one hundred and fifty of the Practice Act that in an action arising upon contract for the recovery of money or damages only, the Clerk shall, immediately after the entry of the default of the defendant, on application

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of the plaintiff, "enter judgment for the amount specified in the summons, including the costs, against the defendant, or against one or more of several defendants, in the cases provided for in section thirty-two."

The plaintiff was entitled to have a judgment entered against Eldridge for the amount due on the notes. The statute pronounces the judgment of the law, arising upon the facts stated in the complaint, in an action upon a contract for the recovery of money, in case the defendant makes default; and that judgment is that the plaintiff recover of the defendant the amount specified in the summons and costs. The Clerk adjudges nothing — can grant no relief — he is merely the hand that enters the judgment of the law. In the language of Mr. Chief Justice Field: "The Clerk in entering judgments upon default, acts in a mere ministerial capacity; he exercises no judicial functions. The statute authorizes the judgment, and the Clerk is only an agent by whom it is written out and placed among the records of the Court. He must, therefore, conform strictly to the provisions of the statutes, or his proceedings will be without any binding force." (*Kelly v. Van Austin*, 17 Cal. 564.) The facts stated in the complaint do not show that the money mentioned in the contracts sued on, was made payable in a specified kind of money or currency, and, therefore, it was not the judgment of the law that the plaintiff recover the amount in any specified kinds of money, and for that reason that portion of the entry of the Clerk, specifying the kind of money in which the judgment was to be paid, is void. But that entry did not affect, or in any manner impair the validity of the judgment for the recovery of the money, and is as powerless as would be any unauthorized entry in respect to the obligation or lien of the judgment. *Utile per inutile non vitiatur*.

It is ordered that the cause be remanded with directions to the Court below, to amend the judgment, by striking out that portion of it which specifies the kind of money in which the recovery is had.

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WILLIAM T. WALLACE v. JAMES ELDREDGE. (No. 2.)

MATERIAL FACT IN PLEADING.—A statement in a complaint that the contract sued on was made payable in a specific kind of money is an allegation of a material fact.

JUDGMENT A CONTRACT.—A judgment is a contract in the highest sense of the term, and the word "contract" as used in the amendment to the Civil Practice Act providing for the rendition of judgment payable in the kind of money specified in the contract, includes judgments.

JUDGMENT ON GOLD COIN JUDGMENT.—If the complaint in an action on a judgment avers that the judgment sued on was rendered payable in gold coin, and defendant makes default, the Clerk should enter judgment payable in the same kind of money.

CONSOLIDATION OF SUITS.—The Supreme Court will not consolidate suits brought upon distinct causes of action.

JUDGMENTS.—If the decision of the Court below was correct when it was made, the appellate Court will not reverse the judgment by reason of any matter of fact which was not shown or offered in the Court below.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

Shafter, Gould & Dwinelle, for Appellant.

Patterson, Wallace & Stow, for Respondent.

By the Court, RHODES, J.

In December, 1863, the plaintiff sued Eldredge upon a judgment, and in his complaint he alleged that by the consideration and judgment of the Court he "recovered against the defendant the sum of three thousand four hundred and seventy-five dollars and seventy-one cents, payable in the current gold and silver coin of the United States of America only, and the further sum of nineteen dollars and twenty-five cents, payable only in the like gold and silver coin;" and he prayed for judgment for those sums, and that they be "adjudged to be payable by said defendant in United States gold and silver coin only." The defendant was duly served with process, and on his failure to answer, the Court, on the 11th of January, 1864,

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rendered judgment by default against him for the amount of the alleged judgment and costs of suit, "to be paid by said defendant in current gold and silver coin only;" and the Court also, in said judgment, directed the Sheriff to receive nothing but gold and silver coin in satisfaction of the execution to be issued upon the judgment. The defendant appeals from this judgment, and the cause comes before us on the judgment roll alone. No proceedings appear to have been had in the Court below by the defendant to set aside the default, and the record contains neither a statement nor a bill of exceptions.

The defendant, by his default, admitted every material fact alleged in the complaint. This is not controverted, nor is it, nor can it be denied that in view of the "Special Contract Act" of April 27, 1863, permitting a judgment to be rendered payable in a specified kind of money, upon a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money, the statement in the complaint, that the contract sued on was payable in a specified kind of money, is an allegation of a material fact. That Act, which has been upheld by this Court in *Carpentier v. Atherton*, 25 Cal. 564, would be nugatory and idle, if the facts which authorize the Court to exercise the peculiar jurisdiction specified in this Act, are not material facts in the cause.

A judgment is a contract, in the highest sense of the term, and as an obligation it possesses a force superior to that of a specialty or simple contract (Chit. Cont. 1; 2 Black. Com. 328; 1 Pars. on Cont. 7); and is included in the meaning of the term "contract," or obligation, as employed in the Special Contract Act. If, in this case, the judgment described in the complaint had never been rendered, and the allegations of the complaint in that respect had been pure fictions, it would have been the plain duty of the defendant to have denied the rendition of the alleged judgment; but his default would have been followed by its usual consequences—the admission that it was true, that the judgment had been rendered as alleged, and the admission would bind him in every Court, and in every stage of the case—while the default remained in force against him

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The appellant moves that we may consolidate this cause with his appeal from another judgment, and consider the two causes as one, and thus in effect incorporate into the second case a *fact*, that not only did not appear in the record, as it came to this Court, but which was not in issue or established in the case while in the Court below. We know of no rule empowering us to consolidate suits brought upon distinct causes of actions. If the consolidation should be made, the desired result would not ensue; for in the trial of the second case, the reversal of the first judgment would be merely matter of evidence, to be offered in proof of an issue of fact, if one had been made in the case.

If the decision of the Court below was correct when it was made, the appellate Court will not reverse it, and certainly it will not do so by reason of any matter of fact that was not shown or offered in the Court below. All the facts in the case, upon which this judgment was rendered, are stated in the complaint, and they are admitted to be true. They are found in no other part of the case, and the Court passed upon them as they were therein set forth, and upon those facts the judgment is correct.

Judgment affirmed.

THE PEOPLE v. ALEXANDER BROWN.

INDICTMENT FOR LARCENY.—An indictment for larceny which charges that the defendant “did feloniously, wilfully, and unlawfully, and with force and arms, steal, take, and carry, lead, and drive away,” etc., contains a sufficient statement of the intent with which the taking was done, without an averment that the property was taken with a felonious intent.

NEW TRIAL IN CRIMINAL CASE.—The appellate Court will not, in a criminal case, grant a new trial on the ground that the verdict is contrary to the evidence, if the testimony is conflicting.

APPEAL from the County Court, Placer County.

The indictment charged “that the said Alexander Brown, on or about the 13th day of May, 1864, and before the finding

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and presentation of this indictment, at the County of Placer, to wit: at a place known as Chandler & Saunders' Ranch, in the County of Placer, did feloniously, wilfully, and unlawfully, and with force and arms, steal, take, and carry, lead, and drive away from the ranch aforesaid, the personal goods and property of another, to wit: the property of W. H. Chandler and J. Saunders, of the value of more than fifty dollars; said property consisting of * * * ,” etc.

The defendant was convicted, and appealed

A. S. Higgins, for Appellant.

The indictment does not charge that the defendant took the horse, alleged to have been stolen, with a felonious intent. The offense consists in the intent. Is the intent to be presumed from the mere taking, or must it be distinctly charged?

J. G. McCullough, Attorney-General, for the People.

The indictment is sufficient. “Feloniously” implies the intent. (Wharton's *Precedents of Indictments*, 190; Wood's *Dig.* 337, Sec. 60; *People v. Garcia*, 25 Cal. 531.)

By the Court, SANDERSON, C. J.

The demurrer to the indictment was properly overruled. The charging part is in the following words: “Did feloniously, wilfully and unlawfully, and with force and arms, steal, take, carry, lead and drive away,” etc., which is not only a sufficient statement of the intent with which the taking was done, under our statute, but also at common law. (*People v. Vance*, 21 Cal. 403; Wharton's *Precedents*, 190.)

We cannot reverse the judgment on the ground that the verdict is contrary to the evidence. Disregarding the testimony offered by the defendant for the purpose of proving an *alibi* (which the jury manifestly did not believe), we are not prepared to say that the evidence does not sustain the verdict. In *The People v. Ah Loy*, 10 Cal. 301, the Court said: “It

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requires a clear case—one in which there is an absence of evidence against the prisoner, or a decided preponderance of evidence in his favor—to justify an interference with the verdict of the jury.” We think this is one of those cases in which the verdict, whether guilty or not guilty, ought not to be disturbed by this Court. The Court below refused a new trial, and that Court could better judge of the weight of the evidence.

Judgment affirmed.

EBEN OWEN v. SETH D. DOTY.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.—The proceedings provided for in the Act of 1850, concerning “forcible entry and unlawful detainer,” are not a substitute for the action of ejectment. The object of the Act, (excluding the thirteenth section,) is to redress wrongs, occasioned by force used or threatened by the defendant, by restoring possession to the plaintiff, and punishing the defendant with fine and treble damages.

IDEM.—The plaintiff must have had the actual possession when the wrongful or forcible entry was made, and if a forcible detainer alone is complained of, the entry of the defendant must have been unlawful.

IDEM.—If the entry of the defendant was lawful, the plaintiff cannot, when his right to the possession has expired, expel him therefrom, or by using or threatening force make his entry unlawful.

COMPLAINT AGAINST TENANT HOLDING OVER.—A complaint in an action brought under section thirteen of the Forcible Entry and Unlawful Detainer Act of 1850, which avers that “when the plaintiff was peaceably in the actual possession of the premises, the defendant, by permission of the plaintiff, entered upon the same,” avers a license to enter, and fails to state that the relation of landlord and tenant existed between the parties, and therefore contains no cause of action.

APPEAL from the County Court, Solano County.

Plaintiff recovered judgment in the County Court, and defendant appealed.

The other facts are stated in the opinion of the Court.

Whitman & Wells, for Appellant.

This action can only be maintained, if at all, under the provisions of the thirteenth section of the Act known as the Forcible Entry and Detainer Act, and our first point is, that it

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is not within the provisions of that Act, inasmuch as the Act relates and is made to apply only to a person holding over, under and contrary to the terms of a lease or agreement, or failing to pay rent. The uniform construction has been that this section applies only to cases where the conventional arrangement of landlord and tenant subsisted, and not to cases where the tenancy exists by operation of law.

It was intimated in *Henderson v. Grewell*, by the late Supreme Court, that this section only applies to cases where a contract of tenancy exists *upon a lease rendering rent*. And this is probably correct when the proceeding is based on the default in the payment of rent, or in that which constitutes its substitute. In this case no lease had expired, and there was no covenant or agreement alleged which imposed upon the defendant the obligation of giving up the premises. The complaint is insufficient for this reason: no lease or agreement is averred, and no breach of suit.

But we submit that the thirteenth section of the Act cited cannot be extended to any such case at the one at bar; otherwise we have a substitute for the action of ejectment introduced into our practice. It applies solely to cases where the conventional relation of landlord and tenant subsists. It is a summary proceeding, to be kept strictly within the statute, proceeding upon the idea that the tenant wrought a forfeiture of his estate or right. (*Chipman v. Americ*, 3 Cal. 323; *Gaskell v. Treanor*, 9 Cal. 339.)

For these purposes there must exist an express or implied contract to pay rent. (*Sampson v. Schaeffer*, 3 Cal. 201; *O'Connor v. Corbitt*, 3 Cal. 273; *Ramirez v. Murray*, 5 Cal. 223; *Treat v. Liddell et al.*, 10 Cal. 303.)

The Act concerning forcible entry, etc., is *strictissima juris*, and that the action will not be allowed to be used as a substitute for ejectment or trespass. (*Merrill v. Forbes*, 23 Cal. 379.)

J. Dougherty, and *M. A. Wheaton*, for Respondent.

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Can a tenant at will be put out of possession under the Forcible Entry and Detainer Act? This question seems to be settled by the Act of 1861. (Laws of 1861, p. 514.) The language is, that "at the expiration of the month, the landlord may reenter, or maintain ejectment, or *proceed in the manner prescribed by law to remove the tenant.*" If we have the right to proceed in the manner prescribed by law, we presume we have our choice to proceed in *any* manner prescribed by law, one of such remedies being under the Forcible Entry Act. Nor is such a proceeding a substitute for the action of ejectment. It is a right of action given by the statute, in addition to the right of action by ejectment. So, at least, *reads* the statute referred to.

Under section second of the Forcible Entry Act, this action can be maintained "against those who, having lawful and peaceable entry into lands, tenements, or other possessions, unlawfully detain the same;" and restitution may be had for lands, tenements, etc., which, after a lawful entry, are held unlawfully. Even were it true, therefore, that this action would not be maintained under the thirteenth section, still, under the second and ninth sections, all that the complainant would be required to show in addition to the forcible or unlawful detainer complained of, would be that he was entitled to the possession of the premises, at the time of the forcible or unlawful holding over.

By the Court, RHODES, J.

This action was brought under the Forcible Entry and Unlawful Detainer Act of 1850. The plaintiff alleges in his complaint that in April, 1863, he was peaceably in the actual possession of the premises in controversy; that while so in possession "the defendant, by permission of the plaintiff, entered upon a portion of the same;" that on the 20th day of October, 1863, the plaintiff notified the defendant to remove from the premises and deliver the same to the plaintiff; and that the defendant refused to deliver up the possession, and

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has since that time "unlawfully, wrongfully and forcibly withheld said premises from the plaintiff's possession," etc.

It is not agreed by the parties whether the action was brought under the thirteenth section or one of the preceding sections of the Act. As the Act and the several Acts amendatory thereof, under which the action was brought were repealed by the Forcible Entry and Unlawful Detainer Act of 1863, we shall not enter into an extended discussion of its provisions in this case.

It was not intended that the summary proceedings provided for in the Act, should be a substitute for the action of ejectment, although the second section, literally read, is broad enough to include every unlawful withholding of the possession from the person entitled to it, whether the defendant's entry was lawful or unlawful. The purpose manifested by the Act, when all the sections, except the thirteenth, are considered together, was to redress the wrongs occasioned by the acts of the defendant, committed with force employed, or threatened, or manifested, by restoring the possession to the plaintiff and punishing the defendant by fine and treble damages. The plaintiff must have had the actual possession when the unlawful or forcible entry was made by the defendant. If a forcible detainer is complained of, the entry of the defendant must have been unlawful, for the defendant who, having a right of entry, peaceably takes possession, cannot by any possibility be guilty of a wrong by defending his possession while he is entitled to it; and if his right to the possession has expired while he is in possession, the person thereupon entitled to succeed to the possession cannot by his own act, and without the aid of the proper Court, put the defendant out of possession; and if he attempts to do so, and force is used or threatened by the defendant, the plaintiff cannot call on the Courts to punish the defendant for the acts of force which he (the plaintiff) has provoked.

This case does not fall within those provisions of the Act we have been considering, for although it is alleged that the defendant forcibly withheld the possession, it is also alleged that

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his entry was peaceable and lawful. The entry having been lawful and peaceable, the proper remedy is an action of ejectment, unless the case falls within the thirteenth section. That section, has for its object the removal of the tenant by the landlord by means of the summary proceedings provided for in the Act, in case the tenant fails to pay the rent, or holds over after the expiration of his term. The parties authorized to institute the proceedings are the lessor and his successors in interest, they occupying the relation of landlord, and the defendants are those to whom the premises are "demised or let," and those holding under them. The parties to the action must bear the relation of landlord and tenant, and the tenant must have held over after the expiration of his term, or contrary to the covenants of the lease, or failed to pay the rent.

The complaint fails not only to state directly that the relation of landlord and tenant existed between the parties, but no facts are stated from which that relation could be inferred. The allegation is that "the defendant by permission of plaintiff entered upon a portion of the same," (the premises)—that is, that the defendant entered by the license of the plaintiff, not that he either took or held any right in the land under the plaintiff. A license to enter confers upon the licensee no interest in the premises, not even the right of temporary possession, but the possession is left in the person holding it when the license to enter was given. The entry by the defendant under the alleged permission of the plaintiff did not create the relation of landlord and tenant between the parties, and for that reason the case is not brought within the thirteenth section of the Act.

Judgment reversed and cause remanded.

Mr. Chief Justice SANDERSON expressed no opinion

Statement of Facts.

THE PEOPLE v. THOMAS KING.

PLEADING IN CRIMINAL ACTIONS.—The criminal code of California has worked the same change in pleading in criminal actions which has been wrought by the civil code in civil cases.

INDICTMENT FOR MURDER.—In an indictment for murder it is not necessary to aver the means by which the homicide was committed, or the nature and extent of the wound, or the part of the body upon which it was inflicted.

STATEMENT OF DEGREE OF MURDER IN INDICTMENT.—An indictment for murder should not designate the degree of the murder. If the indictment does state the degree of the murder, it does not vitiate it, but the statement of the degree may be treated as surplusage.

IMPLIED BIAS OF JUROR.—In order to render a juror called in a criminal case incompetent on the ground of implied bias, it must appear that he entertains a fixed and settled conviction of the guilt or innocence of the defendant, or that he has expressed such conviction.

CHARGE OF JUDGE ON WEIGHT OF EVIDENCE.—Under our Constitution the Judge, in his charge to the jury, cannot express his opinion upon the weight of evidence. He may, however, state the evidence to the jury, and declare the law resulting from the facts proven, and when there is no evidence as to a particular fact or issue, he may so state to the jury.

CHARGE OF JUDGE ON EVIDENCE.—If on a trial for murder there is no evidence of facts and circumstances such as would, under the law, reduce the crime charged to manslaughter, the Judge may so inform the jury, and may charge them that they cannot consider the question of manslaughter.

CHARGE OF COURT PRESUMED CORRECT UNLESS ERROR SHOWN.—If there is no statement or bill of exceptions embodying the evidence, or declaring its purport and tendency, the appellate Court will presume in favor of the correctness of the charge of the Judge to the jury, unless the charge is manifestly erroneous under any and every conceivable state of facts.

INTOXICATION WHEN HOMICIDE IS COMMITTED.—If on a trial for murder there is evidence to show that the defendant was intoxicated when the homicide was committed, the jury may consider the evidence of intoxication, not in extenuation or excuse of the crime, but for the purpose of determining the degree of the crime.

REFUSAL OF AN INSTRUCTION.—It is not error to refuse an instruction asked when the same has already been given in substance.

APPEAL from the District Court, Ninth Judicial District, Siskiyou County.

The following is a copy of the indictment in this case:

"The People of the State of California against Thomas King.

"In the Court of Sessions of the County of Siskiyou and State of California, October Term, A. D. 1863.

"Thomas King is accused by the Grand Jury of the County of Siskiyou aforesaid by this indictment of the crime of mur-

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der of the first degree, committed as follows: The said Thomas King, on the second day of July, A. D. 1863, at the County of Siskiyou and State of California, in and upon one James Duffy, feloniously, wilfully, and of his malice aforethought, did make an assault and did then and there feloniously, wilfully, and of his malice aforethought, cut, stab, and wound him the said James Duffy, and did then and there give him the said James Duffy one mortal wound, of which said mortal wound the said James Duffy afterwards, on the second day of July, A. D. 1863, did die. So the grand jurors aforesaid, upon their oaths, do say, that the said Thomas King, on the said second day of July, A. D. 1863, at the said County of Siskiyou and State of California, feloniously, wilfully, and of his malice aforethought, did kill and murder the said James Duffy, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the People of the State of California."

In the trial, Jesse Davis was called as a juror. On examination as to his qualifications as a juror, he made the following answers to the following questions:

1st Question—"Have you heard what purported to be a statement of facts of this case?"

Answer—"I have heard what purported to be a statement of the facts from different persons."

2d Question—"Do you believe the statements true you heard?"

Answer—"I believed the statements heard, judging from the character of the men who told those statements to me."

3d Question—"From the statements you heard, have you formed or expressed an unqualified opinion as to the guilt or innocence of the defendant?"

Answer—"I have formed an opinion."

4th Question—"Do you still entertain the same opinion?"

Answer—"I do still entertain the same opinion."

5th Question—"Would it require evidence to remove or change the opinion you entertain?"

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Answer—"It would require evidence to change my opinion in regard to the guilt or innocence of the prisoner."

6th Question—"Do you believe these reports sufficiently strong to act on them in your common business transactions?"

Answer—"I believe them as much as I believe any reports that I hear, or as much as I could believe any reports."

The defendant then challenged the juror for implied bias.

The juror also stated, in answer to the District Attorney, that he would not be willing to act on his opinion, and that he could not decide on the guilt or innocence of the defendant without hearing the evidence on the trial, and that he could and would decide the case impartially without reference to what he had heard or the opinion he had formed, and that the only credit he had given to the reports was that of hearsay reports not made under oath, which would not weigh in his mind against testimony of witnesses given in under oath.

The Court disallowed the challenge, and the counsel for defendant excepted.

The defendant was convicted of murder in the first degree, and appealed.

The other facts are stated in the opinion of the Court.

J. Berry, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, SANDERSON, C. J.

The objections to the indictment are not well taken. There is some conflict in the decisions in this State as to what must be alleged in an indictment for murder. Some of the cases go so far as to hold that the essential averments of an indictment under our criminal code are the same as at common law, and that therefore a statement of the manner of the death and the means by which it was effected is indispensable. (*People v. Wallace*, 9 Cal. 30; *People v. Cox*, 9 Cal. 33; *People v. Lloyd*, 9 Cal. 54.) In other cases it has been held that our criminal

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code changes in many respects the rule of the common law, and dispenses with the statement of many facts and circumstances connected with the killing which were usual and perhaps indispensable at common law. (*People v. Stevenson*, 9 Cal. 273; *People v. Dolan*, 9 Cal. 576.) In the former case it was held that a description of the weapon used was not necessary, and it was not material to describe the wound further than by the use of the word mortal, nor the part of the body upon which it was inflicted. And it seems that it is not necessary to aver in terms that the wound was mortal, for if the facts stated show that such was the fact (as that the party died of the wound) the indictment in that respect is sufficient. (*People v. Judd*, 10 Cal. 313.)

Our criminal code was designed to work the same change in pleading and practice in criminal actions which is wrought by the civil code in civil actions. Both are fruits of the same progressive spirit which, in modern times, has endeavored at least to do away with the mere forms and technicalities of the common law which were productive of no good, and frequently brought the administration of justice into contempt by defeating its ends. Under the pretense of informing the defendant of the nature of the charge against which he was called upon to defend, it was necessary, at the ancient common law, to describe the means by which the homicide was committed, and the nature and extent of the wound and its precise locality; from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. It was a long time before legislators and Judges discovered that this rule had nothing but the most flimsy pretext to support it. If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense. A disposition to relax much of this

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ancient strictness in criminal proceedings has manifested itself in modern practice, and in harmony therewith the Legislature of this State has substituted, in the place of the old, a new system of practice and pleading, which retains all the elements of the former so far as they are made necessary by a due regard for the substantial rights of a defendant, but discards all such elements as serve no good purpose, and only tend to embarrass and defeat the administration of justice. That system provides a few plain and simple rules by which to determine the sufficiency of pleadings, and declares that such rules shall be the test. (Section 235.) Those rules are found in section two hundred and forty-six, and in order to ascertain whether an indictment is sufficient or not, it is only necessary to interrogate it by the light of that section. The present indictment stands this test in every particular: 1. It is entitled in a Court having authority to receive it. 2. It was found by a Grand Jury of the county in which that Court was held. 3. It gives the name of the defendant. 4. It shows that the crime alleged was committed within the jurisdiction of the Court. 5. It declares that the offense was committed at a time prior to that at which the indictment was found. 6. It sets forth the act charged as the offense clearly and distinctly in ordinary and concise language, without repetition and in such a manner that any person can know and understand therefrom what is intended; for it alleges that the defendant—stating his name—at a place named, and at a time mentioned which was prior to the finding of the indictment, with malice aforethought assaulted one James Duffy, and did cut and stab the said James Duffy, giving him a mortal wound, of which he afterwards died on the same day, and therefore within a year and a day from the time when the mortal thrust was received, which is all that is necessary to constitute the offense of murder, and sufficiently identifies the act to guard the defendant against a second prosecution, and, as provided in the seventh and last subdivision of the section in question, states the same with sufficient certainty to enable the Court to pronounce a judgment. The indictment is not bad because

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it does not allege that James Duffy was a human being, nor that he had a body, nor the part of his body upon which the wound was inflicted. The first two never were necessary, and the last is not now, whatever it may have been formerly. If there is any objection to the indictment, it is found in the fact that it designates the degree of the murder. While this does not make the indictment bad, and may be treated as surplusage, still the indictment ought not, because it need not, state the degree of the murder. The trial jury, and not the Grand Jury, determine the degree of the crime, and the former should not be embarrassed by the opinion of the latter.

The Court did not err in disallowing the challenge interposed by the defendant to the juror Jesse Davis upon the ground of implied bias. In order to render a juror incompetent on the ground of implied bias, it must appear that he entertains a fixed and settled conviction of the guilt or innocence of the defendant, or that he has expressed such a conviction. Whatever falls short of this does not amount to an unqualified opinion within the meaning of the statute. Admitting that Davis had formed an opinion — which in view of all his answers taken together is extremely doubtful — it certainly was not an unqualified, but on the contrary, a conditional or qualified opinion. The law upon this branch of the case will be found very fully discussed by Mr. Justice Baldwin, in *The People v. Reynolds*, 16 Cal. 130. (See also, *People v. Williams*, 17 Cal. 142; and *People v. Mahoney*, 18 Cal. 180.)

It is next claimed that the Court erred in giving the following instruction:

“In the case that is now being submitted to you there is no evidence on any points or matters given in proof which reduce the crime charged in the indictment to manslaughter; if the defendant be found guilty, therefore, you cannot consider the question of manslaughter upon the evidence in this case.”

This instruction is not a little obscure, and if it was given as represented in the transcript, it is quite possible that the jury may have found some difficulty in determining its exact

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meaning. The record does not contain the evidence, or any part thereof, and we cannot, therefore, read the instruction in the light of the testimony, in view of which it was given, but are forced to determine its meaning by its own terms. If there was any evidence before the jury tending, however slightly, to reduce the homicide to the grade of manslaughter, this instruction was erroneous. If the expression "there is no evidence on any points or matters given in proof," is to be understood as admitting that there were "points and matters given in proof" which, if true, would reduce the offense to manslaughter, but declaring the evidence as to such points or matters to be insufficient to warrant the jury in finding them to be true, it was erroneous, because it assumed to pass upon the weight of evidence, which, under our Constitution, is left entirely to the jury, and in regard to which the Judge, contrary to the rule of common law, is not allowed to express an opinion. On the other hand, if there was a total absence of all testimony as to such facts and circumstances as would, under the law, reduce the offense from murder to manslaughter, and the instruction is to be understood as declaring such to be the case, then it was not erroneous, because Judges, although not allowed to charge juries with respect to matters of fact may state the testimony and declare the law. (Sec. 17, Art. VI, of the Constitution.) At common law a Judge is allowed to express his opinion as to the weight of evidence. (*Commonwealth v. Child*, 10 Pick. 252.) In this respect the constitutional provision referred to was intended to change the rule so as to leave the weight of the evidence entirely to the jury; but Judges may still, as formerly, state what facts are in evidence and what are not; or in other words they may state the evidence *pro* and *con*, in view of which the existence of certain facts is affirmed or denied, which includes the right to state to the jury that there is no evidence as to particular facts or issues, when such is the case. Counsel for defendant seem to have understood the Judge as instructing the jury that there was no evidence as to facts which, under the law, would reduce the offense charged to manslaughter, and to have ex-

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cepted to the instruction upon that ground, so understood — there being no evidence of the character in question — the instruction was not erroneous.

It is proper, however, to add, in this connection, that in the absence of any statement or bill of exceptions embodying the evidence, or declaring its purport or tendency, so far as may be necessary to point the exception, we must presume in favor of the action of the Court below, upon the principle that the party who alleges error must show it. This, however, must be taken with the qualification that where the action of the Court below is manifestly erroneous under any and every conceivable state of facts, this Court will review it, notwithstanding the evidence may not have been brought up. (*The People v. Levisen*, 16 Cal. 98.)

It appears, from the instructions given by the Judge of his own motion, that there was evidence before the jury tending to prove that the defendant was intoxicated at the time the homicide was committed. In view of this evidence certain instructions were asked on the part of the defense to the effect that so far as the degree of murder is concerned no presumption arises from the mere fact of the killing considered apart from the means used and the circumstances under which it occurred; and that in determining the question of premeditation it was proper for the jury to take into account the defendant's condition, as drunk or sober. These instructions were evidently taken from the case of *The People v. Belencia*, 21 Cal. 544, and ought therefore to have been given, unless already given in substance, for as to the law of that case there can be no question. Where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration or the attempt to perpetrate arson, rape, robbery, or burglary, the degree of the offense depends entirely upon the question whether the killing was wilful, deliberate, and premeditated, and upon that question it is proper for the jury to consider evidence of intoxication, if such there be, not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon

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the ground that the condition of the defendant's mind, at the time the act was committed, must be inquired after in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime.

The Court below does not seem to have questioned the law of the defendant's instructions, but refused to give them upon the ground that they had been already given in substance. Upon inspection of the instruction given by the Court, we are satisfied that the law, as declared in the instructions under consideration had already been given in language, perhaps, better adapted to the comprehension of the jury, and hence the ruling of the Court was not erroneous. We add, however, that in such cases it is better to give the instructions asked, than to refuse, for by such refusal a pretext is afforded for an appeal which otherwise, perhaps, would not be taken.

The judgment is affirmed and the Court below directed to appoint a day for the execution.

ALEX. B. GROGAN v. HENRY KNIGHT, ESTHER ANN PACKWOOD, JOEL RUMSEY, ELLSWORTH TILTON, JOSEPH SAVAGE, JOHN DUGAN, JOHN J. REED, AND PETER COGGSWELL.

SURVEY OF PUBLIC LANDS.—The survey of the public lands of the United States into sections and subdivisions of sections can only be made under the authority of Congress, and is beyond the control of the States.

SELECTION OF SCHOOL LANDS BY A STATE.—A selection of public lands made by the authorities of a State in lieu of the sixteenth and thirty-sixth sections granted to the State for school purposes, before the lands selected have been surveyed by the United States, and the survey approved, is invalid, and confers no title upon the State.

SALE OF UNSURVEYED LANDS BY A STATE.—A sale and certificate of purchase made by a State of lands selected by the State in lieu of the sixteenth and thirty-sixth sections, before the lands thus selected and sold have been surveyed and the survey approved by the United States, confers upon the grantee of the State no title or right of possession.

Argument for Respondent.

APPEAL from the District Court, Seventh Judicial District, Solano County.

Plaintiff recovered judgment in the Court below, and defendants appealed.

The other facts are stated in the opinion of the Court.

M. A. Wheaton, for Appellants.

This is an action of ejectment, and the only evidence of title the plaintiff attempted to show was a location of school land warrants on *unsurveyed* public lands of the United States.

These locations being upon unsurveyed lands, were no evidence of title. (Pre-emption Law of Congress of September 4th, 1841, Sec. 8; Instructions of U. S. Land Commissioner, 3d subdivision, p. 502, *Lester's Land Laws*; also Decisions, No. 507, p. 457, *Ib.*; *Terry v. Megerle*, 24 Cal. 609; Statutes of California of 1863-4, p. 301.)

The defendants had the possession sued for at the time the locations were made on which the plaintiff's certificates issued. (Act concerning certificates of purchase, Statutes of 1859, 332; *Id.*, Sec. 5, 302.)

Whitman & Wells, for Respondent.

The plaintiff in this case has based his claim upon certificates of purchase issued by the State Land Office for land selected as school land, taken in lieu of sixteenth and thirty-sixth sections, and duly assigned to him, and certificates of school warrants.

This selection and sale is authorized by Acts of Congress providing for the survey of public lands in the State of California, the sixth section of which specifically grants the sixteenth and thirty-sixth sections to the State for the support of schools. (*Wyman v. Banward*, 23 Cal. 524; *Higgins v. Houghton*, 25 Cal. 252.)

The seventh section provides that the proper authorities of the State may select other lands in lieu thereof when such sections may be reserved for public uses or taken by private

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claims, which lands shall be selected agreeably to the provisions of an Act of Congress, approved May 20th, 1826, and which shall be subject to approval by the Secretary of the Interior.

The right of the State to enact such a law has been sustained by the Federal Courts. (Acts of 1861, 218; etc.; *Jackson v. Wilcox*, 13 Peters, 498.) And until the United States complains of it, or the question arises upon a patent issued from the United States, it is competent for this Court to uphold the selection made by the State, for we do not see here any adjudication as against the claim or title of the United States.

By the Court, RHODES, J.

This is an action of ejectment to recover the possession of a portion of the lands formerly known as the Suscol Rancho. The premises are public lands of the United States, and have never been surveyed under the authority of Congress. The plaintiff relies for his title upon certificates of purchase issued October 17, 1862, by the Register of the State Land Office, upon the location and sale of school lands, selected in lieu of the sixteenth and thirty-sixth sections of the public lands of the United States. The United States Register of the proper land district refused to approve the selection, because the lands were unsurveyed. The defendants were in possession, they having entered upon the land in May, 1862, and each of them claimed a right of pre-emption under the Acts of Congress, to the respective quarter sections upon which he had entered.

It appears in the statement on the defendants' motion for a new trial, that "the plaintiff testified that one Dr. Page had caused the lands to be inclosed in 1861; that said Dr. Page was the real party in interest in this suit; that the plaintiff only held the lands in his name in trust for Dr. Page, and to secure him for the advances he had made; that said Dr. Page had replanted the crops raised on the land, and received the same for

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the year 1863, and had pastured the pasture part of the land; also had received the profits of the land in 1862." The Court found as facts: "First — On the 28th day of October, A. D. 1862, the plaintiff held the certificates of the State of California, duly issued, for the land in controversy; Second — The inceptive steps for the obtaining such certificates were taken before any one of the defendants entered upon the land." The prior possession of the plaintiff, or his grantor, is neither admitted by the pleadings nor found by the Court; and the only finding of fact respecting the plaintiff's title, possession or right of possession, is as above mentioned. The Court from those facts found the following conclusions of law: "First — The plaintiff was at the time alleged in his complaint seized and possessed of the land in controversy, and had title thereto; Second — The title thus held, and the right of possession flowing therefrom, relate to the first steps taken for acquiring the same." It thus clearly appears that the Court found for the plaintiff on the sole ground that the certificates of purchase were sufficient to convey, and did convey to the plaintiff, the right to the possession of the lands described in the certificates, and not on the ground of the prior possession of the plaintiff or Dr. Page. We are, therefore, not required to determine whether the evidence was sufficient to have enabled the Court to find for the plaintiff on the ground of the prior possession of Dr. Page, if it had clearly appeared that his right depending upon his possession had been transferred to the plaintiff. The first finding of fact, which is unnecessarily indefinite, and merely states a portion of the evidence tending to prove a fact, would seem to indicate that the certificates of purchase were issued to the plaintiff or had been assigned to him, rather than that Dr. Page had conveyed the land to him.

The point upon which the appeal must turn has relation to the value and effect of the certificates of purchase issued by the State.

The defendants resist the claim of title set up by the plaintiff, on the ground that the certificates of purchase, having

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been issued before the lands selected had been surveyed according to the laws of the United States, were not evidence of title in the person to whom they were issued. It will not be contended that the title to the lands selected passed to the plaintiff, unless the title would have passed to the State upon the performance, in her behalf, of acts similar in their character to those under which the plaintiff claims, for although the certificates issued to the purchaser, the selection and location of the lands was made for the State. Could the State in October, 1862, by her own act, have acquired title to those lands as portions of the lands to be selected in lieu of the sixteenth and thirty-sixth sections, granted for the purposes of public schools, prior to the survey of the lands by the United States?

The seventh section of the Act of March 3, 1853, provides that such land shall be selected by the authorities of the State agreeably to the provisions of the Act of Congress, approved the 20th of May, 1826; and that Act provides that the lands shall be selected in sections and subdivisions of sections. It requires no argument to prove that the survey of public lands of the United States into sections and subdivisions of sections can be made only under the authority of Congress. The survey is a part of the system devised by Congress for the disposal of the public lands; and the survey is as completely beyond the control of the State authorities as any portion of the system. The selection of a particular tract, as a subdivision of public land, in anticipation of the survey by the United States, would be no less wanting in authority than would the selection of a designated subdivision in anticipation of the grant by Congress. In *Bernard's Heirs v. Ashley's Heirs*, 18 How. 43, a selection of land had been made by the Governor of the Territory of Arkansas, under the Acts of Congress, authorizing him to select lands equal to ten sections, in tracts not less than a quarter section each, and to sell the same for the purpose of raising a fund to erect public buildings in the territory; and it was held that the selection that he had made of a quarter section within a township, the sur-

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vey of which was incorrect and had not then been approved by the Surveyor-General, was invalid, and that the selection could take effect only from the time when the survey was sanctioned and became a record in the district land office.

A question quite similar in its character, in all its essential particulars, was before the Court in *Terry v. Megerle*, 24 Cal. 609, the plaintiff claiming title to the lands by virtue of the location upon unsurveyed lands, of "school land warrants," issued by the State, under the Act to dispose of the five hundred thousand acres granted to the State, for the purposes of internal improvements. Mr. Chief Justice Sanderson, in commenting upon the provisions of the Act of Congress, says: "There is no ambiguity in the language used; on the contrary, the meaning is too plain and obvious to admit of doubt. The language is, 'located as aforesaid,' that is to say, in parcels of not less than three hundred and twenty acres, conformably to sectional divisions and subdivisions and after the survey has been made. * * * The grant imposes conditions as to quantity, manner of selection and location, and time of location, and under it no title to any specific land can vest in the State until all of these conditions have been complied with. The State has no more right to select and locate lands before the survey has been made, than she has to locate it in tracts of one hundred and sixty acres each, or without regard to sectional divisions and subdivisions of the United States survey." We are entirely satisfied with the construction announced in that case, of those provisions of the Act in question, and it is difficult to understand how it could be contended that the grantee of the State, of land selected under her sole authority, prior to the United States survey, thereby acquired the legal title, when it is capable of mathematical demonstration that his asserted title to any given acre of the three hundred and twenty acres selected and located for him by the authorities of the State, is liable to be defeated by the survey subsequently made by the United States.

In the case of *Barry v. Gamble*, 3 How. 32, one of the questions was the sufficiency of the location of a New Madrid

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land certificate, which had been located on public lands prior to the United States survey; and Mr. Justice Catron in delivering the opinion of the majority of the Court, said: "The location was in irregular form, and altogether disregarded the section lines and the ordinary modes of entry under the laws of the United States. This circumstance lies at the foundation of the controversy. The General Land Office, at Washington, refused to issue a patent on locations thus surveyed. The Secretary of the Treasury, on the 11th of May, 1820, and again on the 19th of June, 1820, called on the Attorney-General for his opinion on the validity of such locations. (2 Land Laws and Opinions, 9, 10.) This officer replied 'that the authority given is to make these locations on any of the lands of the Territory, the sale of which is authorized by law; but the sale is not authorized by law until the sectional lines are run, and consequently all locations previously made by these sufferers are unauthorized.' To cure this defect the Act of 1822 was passed," etc. And the Court held that the location was rendered valid by that Act.

It may be admitted that, by virtue of the Act of Congress of 1853, the State became entitled to an amount of land equal to two sections in each congressional township, yet as the State did not, by virtue of that Act, acquire the title to any specified tract of land, and could not acquire it, until the survey had been made under the authority of Congress, it necessarily follows that, prior to such survey, she had no power or authority to confer upon a purchaser from her any right, title or interest in any specific parcel of such lands.

If the selection had been made after the survey, and it remained only subject to the approval of the Secretary of the Interior, the person claiming under the State might with more propriety say, in the language of the respondent, "until the United States complain of it, or a question arises upon a patent issued by the United States, it is competent for this Court to uphold the selection made by the State," but if the selection is prior to the survey, and the defendant goes into possession, without a trespass upon the actual possession of the purchaser

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from the State, if the latter claims protection on the ground that the United States may not complain of his selection and location, the defendant may well reply that the United States may not complain of *his* possession. The question is not whether the General Government will or will not complain of his selection of unsurveyed public land, but it relates to the title on which he seeks to recover the possession; the question is, did the acts and proceedings of the officers, acting on behalf of the State, confer upon the purchaser from her the right to the possession of a tract of unsurveyed land? And this must be answered in the negative. We would not be justified in temporizing with this question, on the consideration that there are very many similar claims to title in this State, the value of which might be impaired by our decision in this case; but, feeling as we do, that the question admits of but one solution, it is our plain duty to declare the law.

The error assigned by the defendants, in ordering their testimony relating to their pre-emption claims to be stricken out, becomes immaterial, in the view we have taken of the case, and in the absence of a finding of the fact of the prior possession of the plaintiff or his grantor.

Judgment reversed and the cause remanded.

Mr. Justice CURREY and Mr. Justice SAWYER expressed no opinion.

THE PEOPLE v. EUGENE CAZALIS.

SUPPLYING THE PLACE OF A LOST PLEADING.—If a pleading in a pending action is lost, its place can only be supplied by motion based upon affidavits showing what the lost pleading contained, and the service of personal notice upon the opposite party of the intention to move, which notice must be sufficiently explicit to advise him of what is intended, as well as to enable him to controvert the affidavits submitted.

APPEAL from the District Court, Third Judicial District, Santa Clara County.

The facts are stated in the opinion of the Court.

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John B. Felton, and J. W. Stephenson, for Appellant.

J. G. McCullough, Attorney-General, for Respondent.

By the Court, SHAFER, J.

The defendant was sued for taxes upon personal property. The complaint was demurred to. When the case was reached on the calendar, the District Attorney discovered that the complaint was lost or mislaid; and the Court, on bare suggestion by him, made an order substituting for the original a paper, presented and filed by the attorney, purporting to be a true copy of the original. This proceeding was had in the absence of the defendant and his attorney, and without notice. The demurrer was thereupon submitted, and in three days thereafter was overruled, and the Court immediately rendered a final judgment, without notice to the defendant or his counsel, and without giving time to answer. The appeal is from the judgment.

It is insisted that the judgment should be reversed upon either one of two grounds: First—That no proof was submitted to the Court showing the loss of the original complaint or that the copy filed was a true copy. Second—That no notice was given that the order would be applied for.

It was held in *McLeadon v. Jones*, 8 Ala. 298, that "the manner of correcting the loss of the pleadings, is, to show by affidavits what the record contained, the loss of which is to be supplied. The substitution can only be made after a personal notice of the intention to move the Court, and the notice must be sufficiently explicit to advise the opposite party of what is intended, as well as to enable him to controvert the affidavits submitted." The case at bar may be distinguished from that of *Benedict v. Cozzens*, 4 Cal. 381. In that case the defendant answered the substituted complaint before the objection, that it was allowed to be filed without notice, was taken. But if the decision in that case should be considered as con-

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flicting with the rule laid down in the case cited from the Eighth of Alabama, it is in our judgment erroneous.

Judgment reversed and cause remanded for further proceedings.

HORACE W. CARPENTIER v. GREENE W. WEBSTER.

OCCUPANCY OF COMMON LANDS BY TENANTS IN COMMON.—Tenants in common hold their lands by unity of possession, and each and every of them has the right to enter upon and occupy the whole of the common lands and every part thereof.

POSSESSION OF ONE TENANT IN COMMON.—One tenant in common has no share except that which is undivided, and has no right to exclude his co-tenant from any portion of the common lands.

OUSTER OF A TENANT IN COMMON BY HIS CO-TENANT.—If one tenant in common incloses and enters into the exclusive possession of a portion of the common lands, not exceeding in quantity the number of acres which he would be entitled to have allotted to him on partition of the whole, and refuses to allow a co-tenant to occupy this portion with him, it is an ouster of the co-tenant, and he may maintain ejectment and be let into the possession of the part from which he is thus excluded.

OUSTER BY TENANT IN COMMON.—One tenant in common may be guilty of an ouster of a co-tenant by excluding him from a portion less than the whole of the property held in common.

A REFUSAL TO LET A CO-TENANT INTO POSSESSION AN OUSTER.—If one tenant in common is in the exclusive possession of a portion less than the whole of the common lands, and his co-tenant demands of him to be let into possession of the same on the ground of his joint ownership, and the other, while admitting the several title of the co-tenant, refuses to let him into possession, this refusal is an ouster.

OUSTER MAY RESULT WHEN TITLE IS ADMITTED.—If a tenant in common denies the several title of a co-tenant, but lets him into possession, it is not an ouster; but if he admits the several title of a co-tenant and refuses to let him into possession, it is an ouster.

DEMAND OF POSSESSION BY CO-TENANT.—A demand made by a tenant in common of a co-tenant in possession to be let into possession of every part of the common lands, is not a notice to the co-tenant in possession to quit.

OUSTER BY ONE TENANT IN COMMON IN CASE OF MEXICAN GRANT NOT SURVEYED.—If several are tenants in common in a grant of land made by Mexico of a given quantity, to be located within the exterior boundary lines of a much larger quantity, and no survey or location of the quantity granted has been made, the exclusive possession by one of the tenants in common of a portion less than the whole of the land within the exterior boundary lines of the larger quantity, and his refusal to let a co-tenant into possession of the same, is an ouster.

APPEAL from the District Court, Fourth Judicial District, Contra Costa County.

Argument for Appellant.

The defendant recovered judgment in the Court below, and the plaintiff appealed.

The other facts are stated in the opinion of the Court.

E. R. Carpentier, for Appellant:

The defendant's acts amount to an ouster of the plaintiff, and the Court erred in instructing the jury that the plaintiff had failed to show an ouster.

Tenants in common possess the whole in unity. Their estate may be several—their possession must be in common. The possession of one is in support of the title of both; but the refusal of one to permit his co-tenant to enter upon and occupy the land, or any part of it, divests the possession so as to entitle the companion to his action of ejectment. (1 Greenleaf Cruise, title 20, §§ 2, 14, 17, 18, 19.)

"No real force, as a turning out by the shoulders, is necessary. If upon demand by the co-tenant, the other denies his right and continues in possession, such possession is adverse, and ouster enough." (*Doe v. Prosser*, 1 Cowp. 217.)

"If a tenant in common drive out of the land any cattle of the other tenant in common, or will not suffer him to enter or occupy the land, this is an ejectment or expulsion." (Coke Litt. 199 b.)

A claim of exclusive right of possession, or denial of the co-tenant's right, or any act which amounts to a denial of right, is an ouster. (*Brackett v. Norcross*, 1 Greenleaf, 82; *Allyn v. Mather*, 9 Conn. 128, per Hosmer, C. J.; *Sigler v. Van Riper*, 10 Wend. 419; *Jackson v. Tibbits*, 9 Cowen, 253; *Edwards v. Bishop*, 4 Conn. 68; *Hargrove v. Powell*, 2 Dev. & Bat. 97; *Gordon v. Pearson*, 1 Mass. 328, etc.)

The last case (*Gordon v. Pearson*) is a parallel case and perfectly in point. There, as here, there was a demand of possession, and a refusal by the defendant, who says, you must get it by law if you can. And this was held a sufficient ouster.

"An ouster must be proved by acts of an adverse character, such as claiming the whole for himself; denying the title

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of his companion; or *refusing to permit him to enter.*" (2 Green. Ev. 359, § 318.)

Exclusive possession, for long periods, has been held both in England and the United States, sufficient to warrant the presumption of ouster, though no other proof was given. (*Doe v. Prosser*, and other cases cited.)

The denial of right which is held to be an ouster, is not necessarily a denial of the co-tenant's title. A denial of the right of possession or enjoyment is all that is meant by the authorities, for though the defendant admit the *title* of his co-tenant, yet if he refuse to allow him to possess, or deny his right to such possession, this would be none the less an ouster.

Moreover, the defendant's answer in this case, is, of itself, an ouster. The complaint avers title, and is verified. The answer admits the plaintiff's ownership of the undivided one half of the rancho, but denies his title to any other or greater share or interest, and unqualifiedly denies his right of possession.

The evidence shows that the plaintiff is the owner of an interest in said rancho, equal to three hundred and twenty acres in addition to the one half thereof; and the right of possession is the very question which was put in issue by the defendant, which was actually tried, and upon which judgment was rendered.

Instead of confessing the right of the plaintiff, the defendant presents an issue upon it; and as the answer has reference by relation to the commencement of the suit, the denial of the plaintiff's right is not only evidence, but conclusive proof of ouster.

As to the point so strongly pressed by counsel for the respondent, that there can be no ouster by a tenant in common, except by the exclusive, adverse possession of *the entire tract* constituting the subject of the tenancy in common, we submit, with all due respect for the learned counsel, that the proposition is wholly unsustained by any of the numerous authorities cited by him, or by any case that can be found in the books, and scarcely merits serious argument in reply.

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The "claiming of the whole," which, according to Lord Mansfield, constitutes an ouster, refers to the right, and not to the boundaries—the quantity of interest and not of acres. (See Vol. 6, Allen's Massachusetts Reports; *Bennett v. Clemence et al.*, abstracted, quoted Vol. 3, American Law Journal, December number, 1863.)

The case from 16th Mass. approvingly cited by the counsel for the respondent, is in point for the appellant, and entirely consistent with the whole current of authority upon the subject. It decides that a tenant in common shall not do, substantially, what was done by the plaintiff in this case—that is, shall not exclude his co-tenant or disturb his possession.

I shall not criticise the language of the instruction that "an actual ouster of the plaintiff *from the joint possession*" must be shown, further than to invite to it the attention of this Court.

The language of the plaintiff's demand was carefully chosen and is not liable to criticism. He had a right to be *let into the possession* of the whole, and that was the extent of his demand. He did not demand or claim the entire possession. The rights of the defendant were fully recognized. He was informed that the plaintiff was the *chief* owner, and he was required not to yield up the possession, but to let the plaintiff into the possession and enjoyment of the premises along with himself. If the plaintiff has any right in the premises, it is the right of common and immediate enjoyment. And this right is denied him by the defendant—denied both as a matter of law, and in fact.

Campbell & Brummagin, for Respondent.

1st. Tenants in common are severally and solely seized each of his own share. They are seized *per my*, but not *per tout*; for this reason they must sue separately, in actions savoring of the realty. 2d. The possession of one tenant in common is, in contemplation of law, the possession of his companions. But one may actually oust the others, and claim to hold in his own right. 3d. One tenant in common has a right to the

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enjoyment of the common property, and for that purpose he may enter upon it, and his co-tenants have no right to disturb such enjoyment. 4th. One tenant in common can compel the others to make partition of the common property.

The Court charged the jury in effect, that before one tenant in common can maintain ejectment against his co-tenant, he must show an actual ouster from the joint possession of the *entire* common property. In other words, that while the defendant occupied no more than his proportionate share, such possession was consistent with the common title, and in contemplation of law was the possession of the plaintiff—and therefore no ouster had been shown.

In support of the doctrine here laid down, we beg leave to refer the Court to the following well established rule of the common law. In Coke upon Littleton, (Vol. I, p. 906,) Littleton lays down the rule in these words: “Also, in the case aforesaid, as if two have an estate in common for term of years, (for one year, half a year, etc.,) the one occupy all, and put the other out of possession and occupation, he which is put out of occupation shall have against the other a writ of ejectione firmæ of the moiety. etc.” Upon which Lord Coke comments as follows: “The one occupy all, and put the other out of possession. These are words materially added; for albeit one tenant in common take the whole profits, the other hath no remedy by law against him, for the taking of the whole profits is no ejectment. But if he drive out of the land any of the cattle of the other tenant in common, or not suffer him to enter or occupy the land, this is an ejectment or expulsion, whereupon he may have *ejectione firmæ* for the one moiety, and recover damages for the entry, but not for the mesne profits.” How materially added? Before the rule laid down in the text, albeit one tenant should take the *whole* profits, the other had no remedy by law against him, for the reason that it was no ejectment; wherefore, it was added, that although there was no remedy for taking the *whole* profits—that is to say, the profits of the *whole* estate—yet if he should *occupy all*—that is to say, the *entire* estate—the co-tenant should have his

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remedy by "*ejectione firmæ*" for his *moiety*: namely, for his undivided interest. The acts from which an ejectment or expulsion might be inferred are stated thus: "But if he drove out of the land any of the cattle of the other tenant in common, or do not suffer him to enter or occupy the land, this is an expulsion." The words "out of the land" means out of the land owned in common; because, if one tenant occupied a portion with a garden, and the cattle of the other entered it, and they were driven out of the garden but not out of or from the common estate, it could not be contended that the owner of the estate would have his action of ejectment against his co-tenant, the effect of which would be that the cattle should be again let into the garden from which they had been driven. So with the other words, "*or not suffer him to enter or occupy the land.*" What land? Why, clearly, the common land; because, if one tenant occupied — say as in case of the cattle — a mere garden spot, and refused to allow his co-tenant to disturb him in its occupancy, but leaving him all the residue of the common property upon which to enter, could such act be construed into a refusal on the part of one to allow the other to enter and occupy the land? Most clearly it could not. And we shall hereafter demonstrate, as we think beyond question, the consistency of our construction of this rule of the common law, with another maxim, namely: that the *possession* of one *tenant in common* is the *possession* of all, and that the latter was intended to enable tenants in common to occupy and enjoy their common estate in severalty, and before partition could be made, without losing any of their rights, and without incurring any of the consequences that result from an adverse possession.

And again, (see page 907,) the same author goes on to say: "In the same manner it is where two hold the wardship of the lands or tenements during the nonage of an infant, if the one oust the other of his possession, he which is ousted shall have a writ of ejectment *de gard* of the moiety, because that these things are chatte^l: real, and may be apportioned and severed." Ousted of what possession? Why, manifestly, of

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the *entire* possession of such lands and tenements, not of a *part*, but of the whole; that is, of "*all*" the lands so held in common. And the reason of the rule assigned by the author is, that such things, he says, are chattels real, and may be *apportioned* and *severed*. This has reference to the writ of partition which, although it is a writ of right, yet a tenant out of possession is not entitled to it. (In this particular our statute adopts the common law rule; it will, however, be shown that even an adverse holding of a fraction of the common property by one tenant will not prevent partition, if the other is in possession of any part of the common property.) In order, therefore, that this right of apportionment and severance by writ of partition shall not be defeated by the mere ouster of one tenant by the other from the possession of the entire property, it is provided that in all such cases the tenant *ousted* shall have his ejectment, for the purpose of restoring to him not only the possession, but the right on his part to *compel* partition of the common property. If a tenant out of possession could still compel partition, the remedy by action of ejectment for his undivided moiety would be without an object and useless. It may be stated that, as a general rule, ejectment will not lie by one tenant in common against his co-tenant, in any case where the remedy of partition exists; because, as long as there is no disseizin, the estate is still in common, but when a disseizin takes place, the estate ceases to be in common. The action of ejectment is therefore for the purpose of bringing the estate back into common, thereby preparing it for partition, which ought to be the first process. But when there *is* no disseizin, a co-tenant's remedy is by petition for partition.

Since the enactment of the statute 3 and 4 W., (see Adams on Ejectment, 136,) the rule of the common law requiring proof of actual ouster in actions of ejectment, brought by tenants in common against their co-tenants, has been dispensed with; or, in other words, a different rule has been adopted. This statute enacts that when any person entitled to any land or rent as tenant in common shall have been in possession or

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receipt of the entirety, or more than his undivided share of the land or rent, for his own benefit or the benefit of any person other than the person entitled thereto, such possession or receipt shall not be deemed to have been the possession or receipt of the person so as aforesaid entitled.

"It follows," the learned author says, "as a corollary from this enactment, that one joint tenant, co-partner, or tenant in common, may always maintain ejectment against his companion, who is in possession of more than his share of the land, or receipt of more than his share of the rent; because such possession is no longer the possession of his co-tenant." (See Adams, 137.)

Now, while the English statute is not in force in this State, the common law, as it stood when that statute was enacted, is in force.

That statute changed the rule of the common law to this extent: 1st—It provided that one co-tenant might maintain ejectment against his companion who was in possession of less than the entirety; 2d—It changed the common law rule of evidence on the question of ouster, making the possession of one co-tenant, when it was for more than his share, evidence of ouster to that extent. The remedy applied by the statute indicates clearly the extent and reason of the change, because, before its enactment under the common law, one co-tenant could not maintain ejectment against his companion unless he was in possession of the entirety, on the ground that a possession of less than the entirety could not be deemed or treated as an adverse possession, which, under the common law, is an essential ingredient in the proof of ouster. And again, as to what constituted ouster under the common law, it is said that many subtle distinctions had been taken, and the statute was intended to provide a remedy in this particular, rendering the proof more simple and certain. The statute, however, left the common law as it stood before its enactment, so far as it relates to a co-tenant occupying no more than his share, which, under no circumstance, neither by the statute nor by the common law, can be tortured into an adverse possession. No

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stronger evidence could be adduced of the correctness of our position than is afforded by this English statute; because, if a co-tenant could have maintained ejectment against his companion when he was in possession of less than the entirety, and if such possession would have been adverse, then there would have been no necessity for the remedy provided by the statute, for the simple reason that there was no inconvenience in the rule as it stood at common law. Besides, we look in vain for any case, either in England or America, and the counsel for the appellant have failed in their researches to find or to point us to a single case where one tenant in common maintained ejectment against his fellow, where the possession extended to no more than his share.

And we here particularly wish to direct the attention of the Court to the pregnant fact, that all the cases cited for the appellant to show that he had been ousted are where one co-tenant undertook to claim and dispose of the whole property, or denied the title of the demandant to any part of the common property.

But we are here met with another maxim of the common law, and which is the sole foundation upon which the appellant rests his right to maintain his present action. It is said that the occupation of tenants in common is undivided, and that neither of them knoweth his part in several. (See 5 Bacon's Ab. 240.)

What is the true meaning of the term *undivided occupation*? In order to arrive at the sense in which this term or maxim of the common law is used, let us refer to another maxim, namely, that all the tenants have a right to enter upon the common property and occupy the same; and again, it is said that one tenant in common has no right to disturb his co-tenant in his enjoyment of the common property. When, therefore, we come to harmonize these maxims of the common law, and to make them consistent the one with the other, and to preserve the rights which they are intended to confer, we must be governed by a practical common sense view of the whole subject, and give to the terms used rather an enlarged construction,

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suited to the condition of the country, than that narrow and technical one which the appellant relies and insists upon.

When it is, therefore, said that their occupation is undivided, it certainly does not mean that all the tenants shall occupy the same precise space at the same moment of time, because that would imply a mathematical absurdity. Neither can it mean that if one is occupying a particular spot, that his fellow may insist upon occupying that precise locality, for that would be disturbing him in his possession and enjoyment of the common property. The occupation must, therefore, to preserve its *unity*, and to give to each his proportionable share of the occupation and enjoyment of the common property, be in its very nature several; because there can, physically speaking, be no such thing as an *undivided occupation* of a single spot of ground by two or more persons at the same time, except in theory, or, more properly speaking, except as a legal fiction. And this legal fiction of undivided occupation was invented to preserve what is called the *unity of possession*, which is the only *unity* belonging to tenancies in common. Hence it is said that the possession of one tenant is the possession of his companions also. So, if one enters under the common title, he enters for all, and although the others may never enter at all, still the occupation is undivided, the *unity of possession* is preserved, and if they all enter and occupy in severalty, such occupation is undivided. It is, therefore, only when one ceases to claim under the common title, denies the title of his co-tenant, and ousts him from the possession of the entire common property, that this theoretical *unity* of possession is destroyed, and the presumption of law that the possession of one is the possession of his fellow, ceases to exist.

That all the tenants should occupy separate and distinct parcels, and at the same time preserve the *unity* of possession, seems to have resulted from a practical and useful necessity growing out of the occupation of estates held in common; because, if the possession of one did not inure to the benefit and protection of all, there could be no such thing as either the peaceable enjoyment or the improvement of such property,

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but there would be a perpetual conflict and a perpetual contest betwixt the tenants in regard to every part and parcel and fraction of the entirety. From what has been said, it would seem to follow that the general right of each tenant, legally flowing from the nature of the estate, should be deemed to fall within the application of the maxim, "*sic utere tuo, ut alienum non lædas;*" and that neither should so occupy the common property as to injure or entirely destroy the rights of the others. In this there is a species of severance, but it is a severance which does not destroy or affect the *unity* of possession, but, on the contrary, preserves and defends it, and at the same time harmonizes all the other elements of this peculiar estate, giving to the joint owners of land not only a beneficial but a peaceable enjoyment of their respective interests. And again, it is said that neither knoweth his part in several; and from this maxim it is argued that a several occupation amounts to a practical severance by metes and bounds. If such occupation were not the occupation of all the other tenants, then it might be urged, with great show of plausibility, that the party so occupying was by his own act making partition of the common property. The right to enter carries with it the right to occupy; but the exercise of this right does not imply that the spot chosen for such purpose is the part selected as the *several* share of such occupant, but it is a mere temporary location, liable to be changed when partition is made; and until partition shall have been made, neither can know his part in several. It is essential to an estate in common to be subject to partition, but Courts, regarding all equities which may exist between the parties, will, in decreeing a partition of the common estate, see that the partition does not lessen any part of the estate in value, (see 1 P. Wm. 446,) and if one tenant has made valuable improvements on the part occupied by him, if it can be done without injury to others, such division will be made as to give him the benefit of his improvements, and even in such cases, recompense in money is made to those who occupy the part of less value. Thus it will be seen that Courts in making final partition of the common prop-

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erty betwixt the tenants, recognize the principle we are contending for in this case, namely, a *several occupation* of the common property before partition.

The appellant has failed to point us to any authority, either English or American, where the action of ejectment was maintained by one tenant in common against his co-tenant for an ouster for a mere moiety of the common property; and we now refer to the authorities cited by the appellant when this case was submitted, and which we claim establish beyond controversy that the ouster must be from the *whole* of the common property.

The English authority cited by the appellant is the case of *Fisher & Taylor v. Prosser*, 1 Cowper, 217. The Court will see that the ejectment in that case was for the entire common property. Lord Mansfield, in defining the essential points necessary to constitute ouster, says: "So in cases of tenants in common; the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share he acknowledges him his co-tenant. Nor, indeed, is a *refusal of itself* sufficient, without *denying* his title. But if, upon demand of the co-tenant of his moiety, the other *denies to pay*, and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse, and ouster enough."

The rule here laid down may be treated as the settled English doctrine on the question of ouster, from the time of its announcement down to the enactment of the statute of W. 4, to which reference has been made, and we submit that it sustains the views we have urged to the fullest extent.

First, it is necessary that when a demand is made, it must be for the *precise moiety* the other denies or refuses to pay, and *denies his title*, that is, his title to the common property, saying he claims the *whole*, that is, in the language of Littleton, "*all*," and continues in possession; this, the learned Judge says, is adverse and ouster enough. Nothing could be clearer, because

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to entirely preclude the idea that the occupancy of a *part* only could be construed into an ouster. He says, that the possession of one tenant in common, *eo nomine*, can never bar his companion, because it is not adverse, but is in support of the common title. The case at bar falls clearly within this rule. The respondent claimed merely as a tenant in common, and his possession never could be adverse, but must, therefore, be in support of the common title. He admitted the co-tenancy of the appellant, and never denied his title even by implication.

So in *Helling's Case*, 11 East, 50, it is said, one tenant in common in possession *claiming the whole*, and denying possession to the other, is sufficient evidence of an ouster.

So, in *Doe v. Wawn*, 3 M. & W. 339, it was held that, where property owned by four tenants in common, the property being covered with houses, and three of the tenants leased the premises for ninety-nine years to a railroad company, and the company pulled down the houses and constructed a railroad upon their site, against the wish of the other tenant, that such occupation was sufficient evidence of ouster, and this decision was made on the ground — 1st, of the rule laid down by Littleton, namely, "that if one tenant in common occupy the *whole* and put the tenant out of *possession and occupation*," it is sufficient evidence of ouster; and, 2d, on account of the peculiar use which the other tenants, through the railway company, made of the entire premises, being of such a character as to exclude the co-tenant from *occupying* the land. Such acts, the learned Judge says, would be as effectual an exclusion as if the defendant had been prevented from entering and occupying in person.

The broad principle which runs through all the cases is here again asserted, namely, that it must be an *exclusion* from the *whole* of the common premises, amounting to an absolute denial of title, in order that one tenant may maintain ejectment against his companion, on the ground of ouster.

The appellant has cited us to *Brackett v. Norcross*, 1 Greenleaf, 89, as an authority which he claims is strongly in his favor. The learned Judge, in discussing the question of ouster,

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says: "On adverting to the evidence as reported by the Judge who presided on the trial we find, 'The agent of the demandant had repeatedly demanded possession—the defendant uniformly refused to admit the demandant to enter, or to suffer demandant's agent to occupy—he also *denied demandant's title, and has ever since held the exclusive possession and occupation.*'" Upon the facts as reported it was held that they afforded sufficient evidence of ouster. The Court will perceive by a perusal of this opinion that the same English authorities to which we have already referred, are quoted and relied upon, particularly the case in 1 Cowper, 217, and great stress is laid on the words, "*denies his title, saying he claims the whole.*"

How widely the facts of this case differ from the case at bar. The language is, "he denied demandant's title, and has ever since held *exclusive possession and occupation.*" (*Fredeck v. Gray*, 10 S. & R. 188; *Valentine v. Northrop*, 12 Wend. 495; *Sigler v. Van Riper*, 10 Wend. 419; *Mumford v. Brown*, 1 Wend. 52; *Keay v. Goodwin*, 16 Mass. 3; *Marcy v. Marcy*, 6 Pick. 372; *Ord v. Chester*, 18 Cal. 77.)

We insist that in order to establish an ouster by one co-tenant of his fellow, upon proof of a demand for possession and a refusal to comply, a demand for the *precise moiety* or share which the co-tenant claims is indispensable.

The reason of this rule must be apparent to all. In the first place a refusal of the co-tenant in possession to allow another to enter, is, as a general proposition, based upon a denial of the demandant's title to any part of the demanded premises; and this denial of title, we shall be able to show, is one of the chief, if not indispensable requisites in the proof of ouster. The necessity, therefore, that the party making the demand should specify the precise share which he claims, in order that the extent of his demand, as well as the consequences of his admission into the possession may be fairly understood by both parties, would seem to be too clear a proposition for argument. But, again, while the party in possession might be willing to admit the demandant, provided he claimed no

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more than his share, he might be very unwilling to admit him if he claimed more than his share; and if he did demand more, and the tenant in possession refused, and even denied his title to the extent claimed, such refusal and denial would not constitute ouster; but, as in the case at bar, where the extent of the demandant's interest is designated by the words "*principal owner,*" leaving the extent of his claim entirely indefinite, undefined, and uncertain, we hold that no reply that could be made to such a demand, should be held to constitute proof of ouster.

On this point we shall first refer to the case of *Fisher & Taylor v. Prosser*, 1 Cowp. 218. Lord Mansfield says: "But if upon the demand of the co-tenant of his *moiety*, the other *denies to pay*, and *denies* his title, saying he claims the *whole*, and will not pay, and continues in possession, such possession is adverse and *custus* enough." The language here used leaves no doubt as to its meaning; that is, there must be a demand for the precise "*moiety*." Now it must not be said that the term "*moiety*," as here used, has reference solely to a demand of the rents and profits, and not to a demand of his share of the common property; because the reason why it should apply to the latter as well as to the former is the same, namely, that the party in possession may clearly understand the nature and extent of the demand made upon him, in order that he may give an intelligible reply, and that he may not be deceived or mislead by an ambiguously, cunningly worded demand, intended to provoke a refusal, for the express purpose of making proof of ouster when none exists. Littleton, too, as we have before seen, in speaking of the remedy of one co-tenant when he is put out of occupation, says, he should have against the other a writ of *ejectione firmæ* of the *moiety*.

In *Colburn v. Mason*, 25 Maine, 434, the rule seems to be clearly laid down that should be adopted in the case at bar. The proof was that the demandant, to show a disseizin, had read to the tenant in possession the description in his deed of a *fourth part* of the premises, and the witness said to him, "These are the premises you are in possession of." The answer

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was "Yes; it is hard to pay twice." Upon this statement of the facts it was held that no ouster had been proved. The Court say that it was incumbent on the plaintiffs to show that the defendant denied their *right* to the possession, or that he did some other notorious act indicative of holding adversely to them, and that the evidence did not establish anything of the kind. And again, they say that not a word escaped his lips tending to a denial of the demandant's *right* as a co-tenant, and that what he said could not amount to an *unequivocal* denial of the demandant's *title*.

It will, in the first place, be seen that the *precise share* of the demandant was stated, and, in the next place, it is laid down as a rule that the reply must amount to a denial of the demandant's right as a co-tenant, and, in the language of the opinion, "an unequivocal denial of the demandant's *title*." Did the reply of the respondent in the case at bar amount to or even tend to show a denial of the appellant's title? His statement was, "that he owned an interest in the rancho, and was in possession of no more than he was entitled to, and that he could not let Mr. Carpentier into possession unless at the end of a lawsuit." In construing this reply, we must keep in view the nature of the demand, which was, that he, Carpentier, was the "*principal owner*." The adjective "*principal*," as used on that occasion, meant that he was the *chief* owner, or, in fact, that he owned pretty much all of the Rancho of San Ramon, and he demanded "to be let into the immediate possession and enjoyment of the same, and of every part and parcel thereof." To this demand the respondent refused to comply; but he did not deny the right of Carpentier as a co-tenant; he did not deny his title; but he merely insisted, as he owned an interest, as he was in possession of no more than he was entitled to, that he could not surrender up the entire possession of the premises, because the language in which the demand was couched lead inevitably to one of two conclusions, either that if he did comply with the demand, Carpentier would take possession of the chief part of his house as well as of his field, or that he intended to turn him out altogether. He

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wanted immediate possession and enjoyment of every part and parcel of the premises. No more comprehensive language could have been used in making a demand for the sole possession of the entire premises. He did not say, "I am the owner of the undivided one half of the Rancho of San Ramon, and I desire to be let into the possession with you to the extent of my interest." If such a demand had been made, then the respondent could have answered understandingly; knowing the precise interest claimed, he could then have given him possession of one half his house and half his field, pointing out the particular parts he should occupy; and this, if the rule laid down in *Mumford v. Brown*, be law, would have been all that he was entitled to. How essential, therefore, it is, that the party making the demand should specify the precise moiety he claims.

So in *Marcy v. Marcy*, it is said, "the demandant claimed of the tenant his share of the demanded premises, and requested the tenant to yield it up." Not to yield up every part and parcel of the premises, but to yield up his share.

In *Bernard v. Pope*, 14 Mass. 438, it is said, "But every dispossession does not amount to a disseizin, especially of tenants in common. For the possession of one is the possession of all, unless by an actual ouster, or an exclusive pernanacy of the profits against the will of the others, one shall manifest an intention to hold the land by wrong rather than by the common title. But without such overt acts, or a sale and exclusive possession for more than twenty years, so that the right of entry shall be gone, a disseizin is not to be presumed."

So in *Prescott v. Nevas*, 4 Monroe, 330, it is stated that one tenant in common may disseize another, but the difference is that acts done by a stranger, which would *per se* be a disseizin, are, in the case of tenancies in common, susceptible of explanation consistently with the real title. And acts of ownership by tenants in common are not necessarily acts of disseizin. The law will not presume that one tenant in com-

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mon *intends* to oust another, the intent must be established in proof.

By the Court, SHAFER, J.

This is an action of ejectment, brought by one tenant in common against his co-tenant, for the recovery of an undivided share of a part of the common property. The plaintiff alleges in his complaint, that on the 1st day of September, 1858, he was seized as owner in fee, and was entitled to the possession of a certain tract of land, describing it as a tract half a mile square and situate in the County of Contra Costa; and that he is still the owner and entitled to the possession thereof. The plaintiff further avers that afterward, to wit, on the day first aforesaid, the defendant entered upon and took unlawful possession of said premises, and wrongfully excluded the plaintiff therefrom, and still continues so to exclude him therefrom, and from the pernanacy of the rents and profits thereof, to his damage in the sum of five thousand dollars; that the said premises are parcel of the Rancho of San Ramon, granted by the Mexican Government to Mariano Castro and Bartolo Pacheco, and that plaintiff has title to said premises under said grant.

The answer avers that the rancho referred to in the complaint, contains eight thousand eight hundred acres; that it has never been partitioned, and that ever since the date of the grant, the rancho has ever been and still is held, owned, and possessed by the original grantees, Castro and Pacheco, and their heirs and vendees, as tenants in common. That on the 9th day of March, 1860, the defendant became the owner in fee simple absolute, by title derived from Pacheco, of one undivided eightieth part of said rancho; that the defendant has ever been, since the 1st day of September, 1858, in possession of about sixty acres of land, parcel of the one hundred and twenty-nine acres described in the complaint, claiming title thereto; and that the one eightieth, to which he derived title from Pacheco, March 9, 1860, as aforesaid, equals

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one hundred and ten acres. That plaintiff owns an undivided half of the larger tract, by title derived from Castro, and no more. The ouster alleged is denied, and the damage also.

It appeared at the trial that the grant to Castro and Pacheco was of two leagues lying within exterior boundaries containing six leagues. That the grant had been finally confirmed, but that there had been no survey or segregation. The title of the defendant, as stated in his answer, was admitted; and the plaintiff having introduced evidence tending to prove the value of the use and occupation since September 1, 1858, for the purpose of proving the ouster alleged in the complaint, called James T. Stratton as a witness, who testified as follows:

"I am a surveyor; am acquainted with the Rancho of San Ramon; know the lands described in the complaint; they are part of the Rancho of San Ramon and are embraced within the lands described in the petition, decrees of confirmation and deeds put in evidence by the plaintiff. About the 19th of December last, the plaintiff and I were on said rancho together. We went there for the purpose of examining the rancho with reference to the final survey thereof, which I was making under instructions from the United States Surveyor-General. On that occasion I saw the defendant at his residence, on the premises in controversy. [A paper marked 'Exhibit No. 1,' is shown the witness.] A notice, of which this is a copy, was then served by the plaintiff upon the defendant. In addition to this written demand, the plaintiff then and there made a verbal demand of the defendant to be let into the possession of the land, with the defendant."

Question—"Did the defendant accede to said demand by the plaintiff?"

Answer—"The defendant did not accede to said demand. He said he owned an interest in the ranch, and was in possession of no more than he was entitled to, and that he could not let Carpentier (the plaintiff) into the possession, unless at the end of a lawsuit, or words to that effect."

Question—"When the defendant said that he was an owner

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of an interest in the rancho, what, if anything, did the plaintiff reply?"

Answer—"I think he said: 'I suppose you are, but that does not entitle you to keep me out of the possession, also,' or words to that effect. The defendant positively refused to let the plaintiff into the possession. I do not recollect the exact words, but I know he was very positive."

Cross Examination—"This conversation took place within the inclosure of the defendant, near his house."

Question—"Was the verbal demand substantially the same as the written one?"

Answer—"It was substantially the same. The plaintiff demanded to be let into possession of the lands occupied by the defendant, and the defendant refused. The defendant's house is situated about the middle of the rancho. There is embraced within the limits of the *diseño* referred to in the decree of confirmation, about six leagues of land, and the land occupied by the defendant is about one four hundredth part of the six leagues, and about one hundred and thirtieth part of two leagues."

Plaintiff here put in evidence the copy of written notice of demand, marked "Exhibit No. 1," which is as follows:

"SAN RAMON, December 20, 1862.

"To GREENE WEBSTER: Sir—You will please take notice that the lands and premises now occupied by you are parcel of the Rancho of San Ramon, of which I am the principal owner, and I demand to be let into the immediate possession and enjoyment of the same, and of every part and parcel thereof.

"Respectfully yours,

"H. W. CARPENTIER."

And here the plaintiff rested.

It appeared from the testimony introduced by the defendant, that the land in dispute, when he first entered upon it, was in a wild state, and that he had added very much to its value by

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cultivation and by erecting buildings thereon. The cause was then submitted, and the Court instructed the jury that "the parties were tenants in common of the Rancho San Ramon; that the defendant was in possession of about sixty acres thereof, described in the complaint; that the plaintiff, to recover against the defendant must show that the latter had actually ousted him from the joint possession of the premises; and that the plaintiff had introduced no evidence tending to prove such ouster, and that defendant was therefore entitled to a verdict." To this instruction the plaintiff duly excepted.

Thereupon the jury, under the said instruction, rendered a verdict for the defendant, and judgment was entered.

It is insisted by the counsel for the respondent, that the instruction that the plaintiff "had introduced no evidence tending to prove an actual ouster," was correct, and on either one of two grounds — first: for the reason that the defendant had a right to the exclusive possession of the sixty acres demanded, on the ground that sixty acres was less than his share; or, second: if he had no such exclusive right, still the exclusion of the plaintiff did not amount to a disseizin — and for two reasons, which will be stated hereafter.

First — Had the defendant a right to the exclusive possession of the sixty acres, on the ground that it did not exceed his share?

As the case does not show that there had been any partition between the parties, and as it does not disclose a lease from the plaintiff to the defendant, nor any agreement or license to occupy, it follows, that if the defendant had the exclusive right asserted, its source must be found in the law of the relation that existed between the parties as tenants in common.

A tenancy in common is where two or more hold possession of lands or tenements at the same time by several and distinct titles. The quantities of their estates may be different; their proportionate shares of the premises may be unequal; the modes of acquiring their titles may be unlike, and the only unity between them be that of possession. Thus one may hold in fee and another for life; one may acquire his title by

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purchase, another by descent; one may hold a fifth, another a twentieth and the like. (2 Bl. Com. 181; Co. Lit. 189 A.) Tenancies in common differ in nothing from sole estates, but the blending and unity of possession. (2 Bl. Com. 194.) "Neither the co-tenants knoweth his own severalty, and therefore they all occupy promiscuously. Tenants in common are they which have lands and tenements in fee simple, fee taile, or for term of life, etc.; and they have such lands or tenements by several titles, and not by a joint title; and none of them knoweth of this his severall, but they ought by the law to occupy these lands or tenements in common, and *pro indiviso*, to take the profits in common. And because they come to such lands or tenements by severall titles, and not by one joint title, and their occupation and possession shall be by law between them in common, they are called tenants in common." (Litt. 188 b.) Coke, in commenting upon the foregoing passage, remarks as follows: "The essential difference between joint tenants and tenants in common is, that joint tenants have the land by one joint title and in one right, and tenants in common by severall titles, or by one title and by severall rights; which is the reason that joint tenants have one joint freehold, and tenants in common severall freeholds. Onely, this propertie is common to them both, viz: that their occupation is undivided, and neither of them knoweth his part in severall." (Coke Litt. Sec. 292.) In section three hundred and twenty-three it is stated that "each of the tenants in common may enter and occupy in common, *per my et per tout*, the lands and tenements which they hold in common;" and this notwithstanding they are severally seized.

From these citations it is manifest that by the very law of the relation existing between tenants in common, each and every of them has the right to enter upon and occupy the whole of the common lands and every part thereof. The rule that tenants in common hold their lands by unity of possession inculcates something more than the technical truth that the possession of one tenant is *prima facie* the possession of the other. In our judgment it also involves the doctrine that the

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tenants, respectively, have a right to enter upon the whole, and upon every part of the whole land, and to occupy and enjoy the whole and every part of it, and that the tenants, respectively, are restrained by correlative obligation, from resisting an exercise of this right in either of its branches. The citations from Littleton go directly to this conclusion: "They (the co-tenants) *ought* by law to occupy their lands or tene-ments in common." "Their occupation and possession *shall be* by law between them in common." "One tenant in common has a *right* of enjoyment of the common property." (2 Bon. In. 314.) These quotations are wholly irreconcilable with the idea that one tenant in common, as such, can have the right to exclude his co-tenant from any portion of the common lands in advance of partition. Before partition, a tenant in common has no share, except one which is undivided; and that he cannot possess in severalty, for the reason that it is undivided; and furthermore, he "knoweth not of this, his severall." The only unity between tenants in common is the unity of possession, and if each man knew and could designate his part in severalty, without partition, "even this unity would soon be destroyed." (2 Bl. Com. 192.) He who has no right to possess, except in common with others, in claiming the right to possess solely any any part of that to which the common right extends, utters a solecism.

Counsel insist that "while the defendant occupies no more than his proportionate share, such possession is consistent with the common title, and therefore, his possession is no ouster." It is true that the bare occupation of the sixty acres by the defendant is not inconsistent with the common title; but couple with that occupation a refusal on his part to allow the plaintiff to enter upon and occupy the sixty acres with him, and we have then a possession in him that is not consistent with the common title, and which, therefore, does amount to an ouster.

But counsel rely upon authority "to demonstrate that tenants in common can [as matter of right] occupy and enjoy their common estate in severalty before partition, and without

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incurring any of the consequences that result from an adverse possession." We have examined the cases referred to, and fail to find in them any traces of the doctrine contended for. In *Mumford v. Brown*, 1 Wend. 52, it was adjudged simply that "a tenant in common, hiring the share of his co-tenant, and continuing in possession at the expiration of the term, doing no act to prevent the co-tenant from occupying with him, is not liable to double rent as holding over, though notice to quit has been given." In *Kray v. Goodwin*, 16 Mass. 1, the only point decided was that "if the tenants in common, by agreement, occupy separate parts of the common property, trespass will lie by one of them against the other who removes personal property of the former therefrom against his will." And it is undoubtedly true, as suggested by Mr. Justice Wilde, in the opinion, that where there has been no agreement for separate occupation, neither of the tenants would have a right to remove the property of the other from the common lands against the will of the owner. But there is nothing in all this that has the slightest relation to the point here made for the respondent. Because one tenant cannot assault another, or interfere with his goods with impunity, it certainly does not follow that one can occupy a part of the common lands and exclude his companion therefrom, even though the part should not exceed the tenant's share. In *Marcy v. Marcy*, 6 Met. 360, one of the points adjudged, having to do with tenants in common, is the following: "Where one of two tenants in common of lands conveys the whole estate to A. by a deed, with warranty, and A. enters, claiming title to the whole, and on being requested by the co-tenant to give up a moiety thereof, refuses so to do, and declares that he will stand a law-suit before he will give it up, there is an ouster of the co-tenant which will entitle him to maintain a writ of entry." Obviously, there is nothing in this judgment bearing upon the particular question now under consideration; nor is there any argument, illustration or remark in the opinion that touches it. These are the only cases to which we have been referred as being opposed to the doctrine that a tenant in common

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does not and cannot "know his severall" in advance of partition, and in our judgment those cases do not make that possible which is declared to be impossible by the maxim. There is no decision nor saying, in the books, that questions the universality of the maxim, or that suggests any ground of assurance that if the rule were otherwise, the premonition of Blackstone that "the unity of possession would soon be destroyed," would not be speedily realized in the fact. We close the discussion upon this point by remarking, that the general principle as stated in Littleton has been reasserted in the broadest terms by a recent text writer: "Each owner in respect to his share has all the rights, *except that of sole possession*, which a tenant in severalty would have." (1 Wash. R. 416.)

On the grounds stated, we consider, that if there was no ouster proved at the trial, it was not for the reason that it appeared, by legal conclusion, that the defendant had a *right* to the sole possession and enjoyment of the sixty acres, they being no more and "less, even, than his share."

Second — But, assuming that the defendant had no exclusive right to the possession of the sixty acres, it is insisted that there was still no ouster, and on the ground of either one of two reasons. It is said, first, that one tenant in common cannot, by legal possibility, be ousted by another, unless the ouster be of the whole of the property held in common; or, if the law be otherwise, then secondly, that there can be no ouster without a denial of title; and that there was, in this case, no such denial, but, to the contrary, the plaintiff's title was formally acknowledged.

1. Is an ouster of one tenant in common by another, from less than the whole breadth of the common lands, impossible as matter of law? The learned counsel maintains that such an ouster is impossible; we consider that it is not, and shall proceed to state the reasons why. The question will be treated both upon principle and authority.

The position of counsel is not in keeping with some of the views expressed in argument. In discussing the proposition

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which we have just dismissed, it was urged that "while the defendant occupied no more than his proportionate share, such possession was consistent with the common title, and in contemplation of law was the possession of the plaintiff, and therefore was no ouster." Now, this involves an admission, that if one tenant, of his own head, should take up and hold in severalty *any more than his just share of the common land*, and exclude his co-tenant therefrom, it would (particularly if the title were denied) amount to an ouster; and it follows that it is possible that one tenant may oust another, to a legal intent, without ousting him of the whole of the lands.

Further: In the passage above quoted, and elsewhere, counsel maintains that whether any given act will amount to an ouster, must depend upon whether the act is or is not consistent with the common title; that is, consistent with the common right to occupy and enjoy, for beyond that, there is, as to tenancies in common, no common title. This generalization is advanced as a test, by which to determine whether a tenant has or has not been ousted as the result of any given act; and we accept the test as being generally correct. It follows, then, that whether the exclusion of one tenant by another is from the whole of the land, or from only a part of it, is a matter of entire indifference; for the partial exclusion no more consists with the common right to occupy than the total exclusion. The act done, in the one case, is of the same essential character as the act done in the other. In both cases the result reached is the same—tortious exclusion—and the only difference between the cases is, that in the one the wrong is more extended than it is in the other. But that difference lies in circumstance and not in principle; and it follows, by the very point of the agreed test, that an ouster of a part of the common land by one tenant in common, of another, is legally possible. The test may be fallacious; but assuming its correctness, the position of counsel is a mistaken one, unless, indeed, it can be successfully contended that, while total exclusion, accompanied (if needs be) with a denial of title is inconsistent with the common title that partial exclu-

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sion, accompanied (if needs be) with a like denial, is consistent with it. And we here remark, to avoid all chance for misapprehension, that we are not considering now whether there can be an ouster without denial of title; for present purposes the necessity of such denial may be taken as admitted. The question is, simply, whether an ouster by one tenant, of another, of less than the whole of the common property, can be accomplished by any means.

But further: He who asserts that one tenant in common cannot oust a co-tenant of a part of the common lands, asserts that there may be a case, having all the essential characteristics of an ouster, which must fail not only of apt and appropriate remedy, but of all remedy, either at law or in equity. Partition would afford no redress for the dispossession, whether total or partial. In the first place, the tenant expelled might not desire a partition; and it is possible that a partition would be equally unwelcome to the co-tenant who expelled him. In the second place, partition does not lie between tenants in common at common law (2 Bl. Com. 182, 191,) and we are now treating the subject on common law conditions only. And in the third place, partition in equity is not for the purposes of redress for ousters, nor for any description of legal wrong previously committed; but for the sole purpose of terminating the common tenancy. By the common law the ejected tenant was not only entitled to be restored to his moiety, but to damages also. (Coke Litt., Vol. I, p. 906.) In chancery in partition cases there is no account taken of damages, but of mesne profits only. (1 Story's Eq., Sec. 466.) If the position taken is correct, we have then, not only a distinction without any substantial difference, but a wrong, by exact definition, which knows no redress. Nor does the incongruity stop here; for the wrong which is fully redressed, is identical in every material particular with the wrong which may be committed with impunity. The two wrongs differ only in dimensions; but the smaller of the two may well be too large for the rule of *de minimis*.

But further: Sufficient has been said to show that the posi-

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tion, now in question, is opposed not only to the sense of the thing, but also to the general analogies of the law; and if maintainable at all, it must be upon purely technical grounds. The learned counsel recognizes this view, and puts his proposition distinctly upon the ground that "it consists with the maxim that the possession of one tenant in common is the possession of all." By "consists," we understand counsel to maintain that the truth of his proposition may be deduced from the maxim. The maxim, read freely, would, undoubtedly, bear out the proposition that one tenant cannot oust his co-tenant of a part of the common lands; and so read, it would also establish that one could not oust the other of the whole of the land. In other words, the maxim, if thus rendered, would establish that an ouster of one tenant by another was impossible in law. But the words of the maxim have no bearing upon the limited "impossibility" asserted, except as they establish a larger impossibility that includes it, and therefore, they do not establish the proposition, distinctively, at all. The only distinctive proposition which the letter establishes is, that one tenant in common cannot oust another in any event, inasmuch as the possession of one is the possession of the other. The conclusion is, that the maxim, read by the letter, does not establish the disputed position as such.

There is but one other way of reading the maxim, and that is juridically. Juridically, the maxim establishes that "the possession of one tenant is the possession of another in those cases only where the possession is not adverse;" and it bears upon no point of law but that. Therefore, the truth of the disputed proposition is no more established by the maxim, than the truth of the maxim is established by the dint of the proposition, supposing its truth to be given and that of the maxim to be disputed. The proposition of the maxim, as qualified, is, in part, that "an adverse possession by one tenant is an ouster of the other." The proposition of counsel begins where the other leaves off, and asserts, "but one tenant cannot by legal possibility possess any part of the land adversely, unless he possesses the whole of it adversely."

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The propositions are distinct. The dialectician, trying their relations by the tests of his science, would be likely to notice that they had different subjects and different predicates; and to hold, on that technical ground, that they could not be interdependent. The two propositions "consist" with each other in one sense, for both may be true at the same time. They furthermore consist with each other for they may both be false at the same time. But the truth of the maxim, as limited, being given, the proposition that there can be no ouster of a part, may be false; therefore the truth of the proposition is not only not deducible from the maxim, but has absolutely nothing to do with it. No other technical ground has been invoked in favor of the view taken for the respondent.

A tenant in common may injure his companion by ouster, or by doing any permanent injury to the freehold; and the power to injure in either of these modes is as little affected by legal as it is by moral disabilities. Nor can it be restrained in the nature of things, except by the capacity of man to do wrong. So far as the power to injure in either of the modes stated is concerned, tenants in common stand to each in no other attitude than that of strangers. In thus acting inconsistently with the common title, the aggressing tenant puts himself outside of the pale of the relation and enters upon a work which the law of the relation forbids. In that behalf, he is thereafter his own man, and may determine for himself the dimensions of the torts he will commit. He may trespass upon the rights of his co-tenants, by permanently injuring a part of the freehold, or by laying waste the whole area at his election. He may oust his co-tenant from a part of the common estate, or carry the ouster to the maximum, by dispossessing him of the whole of it. The limited oneness of the parties, interposes no obstacle, for *quoad* the wrong doing, they are twain. When it was first found out, and adjudged that one tenant in common could oust another, we consider that the point now made for the respondent was in effect adjudged against him.

We have so far treated the question upon analogy, and with reference also to certain admitted principles governing the

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relation of tenants in common; but as it is urged that these views unsettle the foundations, we consider that the occasion might not be fully met were we to dismiss the point in hand without investigating it upon authority.

To support the proposition in question, counsel cite from Coke upon Littleton, (Vol. 2, Sec. 323,) as follows: "Also, in the case aforesaid, as if two have an estate in common for a term of years, the one occupy *all* and put the other out of possession and occupation, he which is put out of occupation shall have against the other a writ of *ejectione firmæ* of the moiety," etc. As matter of reasoning, the truth of the disputed position does not follow from the doctrine of the quotation. In the first place, the learned writer illustrates, rather than states, a proposition; or, more exactly, he states a proposition by putting a case, and then declaring the law of it. But as matter of mere reasoning, are we therefore to conclude that the legal truth declared is applicable to no predicament of facts except that put by way of illustration? The habit of the reason is the other way; and the true conclusion would be, that the doctrine announced was applicable to every state of facts substantially like the facts put. Let it be stated, that "one who withholds a debt, or the whole of a debt shall be liable to an action," would it follow, by even plausible conclusion, that an action would not lie when a part only of the debt was withheld? Certainly not; and for the reason that the several withholdings differ merely in degree. In the statement of general rules or principles, terms of the largest comprehension are ordinarily used, but it is to be remembered, *omne major continet in se minus*. If, then, one tenant in common cannot oust his co-tenant of a part of the common property, the warrant for it must be found elsewhere than in the passage cited from Littleton. That citation, *proprio vigore*, does not establish the proposition, in our judgment.

But Coke, in commenting upon the citation, in the first place, states a distinction between the case of a sole occupation by one of "all" the land, accompanied by an exclusion of the other from the possession, and the case of one tenant

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taking the whole of the profits; holding that in the one case there would be an ouster, and in the other that there would not; and then proceeds as follows: "But if he drive out of the land *any* of the cattell of the other tenant in common, or not suffer him to enter or occupy the land, this is an ejectment or expulsion whereon he may have *ejectione firmæ* for the one moitie, and recover damages for the entirety, but not for the mesne profits." One tenant, then, may oust another by driving "any" of the cattle "out of the land;" or by not suffering him "to enter or occupy the land." The position taken here for the appellant, does not controvert that proposition in either one of its branches. In short, the truth of the proposition is a matter utterly foreign to the point in question; for conceding its truth, the truth of the respondent's postulate cannot be claimed by way of deduction. The word "any," as it occurs in the phrase "any of the cattle," means a part of the cattle; but as it could not be deduced from the word "any," that, if one of the tenants should drive off the whole of the other's cattle, it would be no ouster, so it cannot be inferred from the bare statement: "If one of the tenants occupies the whole of the land and excludes the other from it, there will be an ouster of the whole," that if one tenant should occupy the whole of a given part, and exclude the other from the whole of that part, that it would not be, in legal judgment, an ouster from the whole of that part, "whereupon he (the ejected tenant) might have *ejectione firmæ* for the one moiety" thereof. On the contrary, as matter of reasoning, the conclusion would be the other way. That is to say: the word "any," as it stands, argues that if the whole of the cattle should be driven out of the land, the act would, and not that it would not, amount to an ouster; and so, by parity of reasoning, the word "whole," as it stands, instead of favoring the respondent's proposition, comes but little short of demonstrating it to be fallacious.

But further: "If one tenant will not suffer the other to enter or occupy the land" (that is, the whole of the land) there is an ouster by the direct force of the letter. Now, if one tenant

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will not suffer the other to enter upon or occupy any given part of the whole, he does not suffer him to enter upon or occupy the "whole" of it, and therefore, in such case, an ouster results, not merely by the methods of the reason, but by the direct force of the letter also. And so it appears, that the citation from Littleton, and the comment thereon, instead of establishing the proposition advanced for the respondent, are opposed to it; first—by necessary deduction, and in the second place—by direct statement.

The case of *Marcy v. Marcy*, 6 Met. 372, does not establish the doctrine contended for, but, in our judgment, might well be relied on as authority against it. But we cannot stop here to give an analysis of the case, and we shall pass it for the present, remarking merely, that the passage inadvertently cited from the opinion of Mr. Justice Hubbard as a proposition of law advanced by him, is a mere statement of a position assumed by counsel in argument. The case of *Lloyd v. Gordon and Wife*, 2 Harris and McHenry, 260, we have not had access to; but counsel present the following extract from the opinion; "So long as one tenant in common is possessed of any part of the land, he shall be considered in possession of the whole, unless there was a separation of a *part* by actual inclosures by the other, who also denied the title of the other to hold in common." This extract, upon which much reliance seems to be placed, instead of supporting the point made, contravenes it directly; for it states that the holding of a part by one tenant in common, will, under certain circumstances, amount to an ouster of the other therefrom, thereby showing that an ouster of the whole of a portion of the common property is not an impossible event in the opinion of the Court. We have examined the other cases cited for the respondent, and in no one of them is the point, now in hand, either presented or discussed. They do no more, in effect, than to reiterate the citations from Littleton and his commentator, previously quoted and answered.

But counsel relies upon a supposed parliamentary judgment, coinciding with the view presented by him. Considering the

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great care and deliberation with which statutes affecting the common law doctrines of real property are and have been passed in the British Parliament, any expression of opinion by that body on a common law question of that character, would doubtless be entitled to great consideration. Counsel find the judgment alluded to in the third and fourth Wm. IV, C. 27, S. 12, cited in Adams on Ejectment, p. 136. The author begins by stating the maxim of the common law, that the possession of one tenant in common is *prima facie*, the possession of his companion, and that it is necessary in order to enable one to maintain ejectment against the other, that the latter should prove an actual ouster. The learned author then proceeds as follows: "Many subtle distinctions have been heretofore taken as to what acts shall be deemed to amount to an actual ouster; and it was in one case expressly decided that the bare perception of the whole profits for twenty-six years without accounting, was insufficient; but these difficulties are ended by Stat. 3 and 4, Wm. IV, C. 27, S. 12, which abrogates the maxim of the common law, and enacts that when any person entitled to any land, or rent, as coparcener, joint tenant, or tenant in common, shall have been in possession or receipt of the entirety, or more than his undivided share of the land or rent, for his own benefit or the benefit of any person other than the person entitled thereto, such possession or receipt shall not be deemed to have been the receipt of the person so as aforesaid entitled." By this statute the rule of the common law was "abrogated" in two particulars, and a new rule enacted. First: Whereas, by the common law a bare receipt of the whole, or of any lesser portion of the rents, was no ouster, the statute provided that if one of the tenants received the whole of the rents, or any more than his share of them, it should be an ouster *per se*. Second: Whereas, by the common law, possession, whether of the whole or of a part, did not *per se* amount to an ouster, it was provided that whenever the possession was of the whole, or of more than the tenant's share, it should in itself, without further proof, be deemed an ouster. Laying out of account the matter of rents, the

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only common law truth which Parliament can be said to have recognized in this piece of legislation, is the maxim that the possession of one tenant in common is the possession of his companion *prima facie*; and all that Parliament did was to so limit the application of that maxim as to make a bare possession of the whole, or a bare possession of more than the tenant's share of the land, an ouster in itself. Counsel urges that as the statute makes possession of more than the tenant's share of the land an ouster, it follows, by necessary deduction, that Parliament must have been laboring under the impression that, by the common law, a possession by a tenant in common of his share, and *a fortiori* of a part less than his share, did not amount to an ouster. To this we agree. But the true consequence is larger than that, viz: that the possession of one tenant, however restricted or expanded, did not in itself, in parliamentary judgment, amount to an ouster under any imaginable circumstances at common law. The result is that the statute of William IV does not recognize or assume the doctrine denied, but another and entirely distinct one, which is on all hands admitted to be a rule at common law.

It is further insisted that the idea that one tenant in common can be ousted of a part of the common property involves an absurdity; and a diversity of extreme cases are put by way of illustration. The point made to establish the supposed absurdity is, that as the tenants cannot, in the nature of things, severally occupy or fill the same space at the same time, therefore they cannot jointly occupy the common property, except as each shall be allowed a several point to stand on — a choice of lines on which to travel over the estate, and a place where each can eat and drink, and take his needful repose, without being liable to be disturbed by his associates. We cannot see that the rule, which we are disposed to uphold, would interfere at all with the exemptions claimed; for those limited immunities are essential to the beneficial possession and enjoyment of the common property by the tenants, and therefore each of them may claim those immunities as matter of right. They are but means to the end of joint beneficial possession.

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The question of ouster by one tenant in common of another, is a question of intention to be found by the jury from the overt acts proved in the case. (*Prescott v. Nevers*, 4 Mason, 330; *Cummings v. Wyman*, 10 Mass. 468.) And if the jury should find an ouster, in an ejectment brought by one tenant against another, from evidence tending to prove merely that the defendant refused to let the plaintiff into a joint occupancy of the particular spot of ground upon which the defendant was temporarily standing or lying at the time when he was formally required so to do, or refused peremptorily to allow his associate "to occupy the same bed with him," the verdict would probably be set aside and a new trial granted. It was held in *Keay v. Goodwin*, 16 Mass. 1, that an exclusive occupation of a part of the land for a temporary purpose, such as piling boards and lumber, did not amount to an ouster.

But the point made for respondent may be met by authority. In 5 Bacon's Abridgment, page 299, the author, in discussing the subject of partition, states that "the bare fact that *part* of the land of which partition is sought by bill in chancery, is *adversely held* by one joint tenant or tenant in common, will not prevent the Court from taking jurisdiction to decree partition before the controversy as to title is settled at law." This statement is directly opposed to the theory that one tenant in common cannot be disseized by his companion of less than the whole. The author takes the case of an *adverse* holding of a part, and says that chancery will not delay a partition until the controversy has been settled at law. And how settled at law except by ejectment? (*Overton's Heirs v. Woodfolk*, 6 Dana, 374.)

Marcy v. Marcy, 6 Met. 360, previously cited, was a writ of entry to recover an undivided moiety of fifteen acres of land, parcel of a larger tract of which the parties were or had been tenants in common. One of the points made for the defendant was that there had never been any valid partition of any portion of the common property, and, therefore, that the action did not lie as to the fifteen acres. The defendant claimed, however, that there had been a partition of the whole

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farm, less the fifteen acres. The Court held that "it was unnecessary to determine what title had been acquired by the parties in consequence of the parol partition; whether they were still tenants in common, as the defendant contended, or whether they own in severalty." Why unnecessary? On the respondent's theory the result properly depended upon the solution of the very question which the Court thought had nothing to do with it. It is manifest on the face of this case, not only that one tenant recovered of his co-tenant, in a writ of entry, a part of premises assumed to be undivided for all the purposes of judgment, but that the recovery was had in spite of the specific objection now taken for the respondent.

In *Stedman v. Smith*, 8 El. and Bl. p. 1, it appeared that the parties were coterminous proprietors, and that a wall between their several lands was the common property of the two. It appeared further that the defendant in 1855 erected a wash-house on his own premises, the roof of which occupied the whole width of the wall along the wash-house *so far as it* was contiguous thereto; and he let into the wall a stone on which was inscribed, "This wall and the ground on which it stands belongs to Mr. Smith, 1856." The question raised, was, whether the evidence tended to prove an ouster, and the point was decided in the affirmative. In this case the action involved, not the whole, but a part only of the wall owned in common. *Jackson v. Tibbits*, 9 Cow. 241, was an action of ejectment for one hundred and twenty-nine acres of land, parcel of a much larger tract held originally in common. A partition had been made, at an early day, and the defendant had possessed the premises demanded, for twenty years, claiming under the partition. The suit was brought upon the theory that the partition was a nullity, and that the plaintiff therefore was a tenant in common of the one hundred and twenty-nine acres parcel of the larger tract. The partition was held to be null, but the defendant had judgment on the ground of twenty years *adverse* possession. This is also a direct adjudication of the point in controversy. Wherever it is not possi-

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ble for one tenant to oust his companion, it must be impossible also to possess *adversely* to him.

In *Bennett v. Clemence et al.*, 6 Allen 10, the parties were tenants in common of a tract of land, and the plaintiff owned a tract adjoining in severalty. The plaintiff erected a permanent building, the principal part of which stood upon his own land, but a small portion of it was on the common lands, but not enough to be used separately with any advantage to the occupant. It was held "that such an exclusive appropriation of a part of the common lands by one tenant in common, to his own use, by the erection of a permanent structure, was evidence of an ouster of the co-tenant;" and it was stated as a general truth, that "a tenant in common may re-enter into the *part* from which he has been ousted, provided he can do so without a forcible entry or breach of the peace."

The entire correctness of these decisions is not only manifested by the principles and analogies already adduced, but also from a well settled doctrine to which we now for a moment invite attention. If one tenant in common convey a *particular* part of the lands held in common, to a stranger, the deed is void, or, at least, voidable, as to his co-tenant, though good against the grantor. It follows, then, that if the grantee should enter upon and occupy the part so conveyed to him, and should, furthermore, exclude the co-tenant therefrom, that the latter would have his action to be let into possession. According to *Stark v. Barrett*, 15 Cal. 368, "the conveyance could have no legal effect to the prejudice of the co-tenant," but "that, until partition, the grantee would be entitled to the use and possession as co-tenant, in the parcel conveyed, with the other owners." Now, if the act of exclusion, in the case put, would amount to an ouster, why should not the same act, if performed by the maker of the deed, be followed by a like consequence? No reason can be suggested except those we have previously considered and held to be fallacious.

We close the discussion on this branch of the general subject, by suggesting that the cases which have been cited, are to be regarded as so many judicial expositions of the true

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meaning of the rule as stated in Littleton. By that statement, the one tenant must "occupy," as distinguished from "possess." He must also put the other "out of occupation." The aggressing tenant must occupy "all"—that is, he must actually occupy all of that from which he excludes his companion—the sole point and purpose of the author being to state that, as between tenants in common and joint tenants, there could be no ouster except one that was actual, as contradistinguished from constructive. And that Coke understood that to be the only point made in the text, is entirely manifest from the first passage in his general comment, which passage we here reproduce as it is written: "The one occupy all and put the other out of possession." These are words materially added, for "albeit one tenant in common take the whole profits, the other hath no remedie by law against him, for the taking of the whole profits is no ejectment."

Third—The remaining ground upon which it is argued that no evidence was introduced at the trial tending to prove an ouster, is, that there was none tending to prove a denial of plaintiff's title by the defendant; but, on the contrary, that the evidence was decisive to show that his title as tenant in common was formally and persistently acknowledge^d.

In case an ouster is sought to be proved, as between tenants in common, on the ground that the defendant being in the sole possession of the land, refused to pay to his co-tenant his just share of the rents and profits, the refusal, unaccompanied with a denial of the title of the co-tenant, will not amount to an ouster. The case of *Fisher v. Prosser*, 1 Cowp. 217, cited for the respondent, goes to that conclusion only. The case at bar is of an entirely different impression. On grounds already stated, the plaintiff had a right of entry upon the demanded premises; and that right was denied and resisted—the defendant being at the time in the sole occupation of the sixty acres. Littleton gives the rule applicable to the facts of this case in the passage previously cited; and the ouster therein declared consists solely in a putting "out of possession and occupation;" and it is well settled that exclusion from possession

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and putting out of possession are equivalents in law. Coke (Sec. 323) makes no account of denial of title in the sense in which the phrase is used in the objection; for he says if one tenant in common "will not suffer the other to enter and occupy the land, this is an ejectment or expulsion." These definitions make the ouster to consist in overt acts; and if the co-tenant is either expelled or excluded from the land by reason of them, he having the right to remain, or to enter upon it, all the facts are ascertained which the definitions contemplate. And it may be added, that such overt acts practically deny the only "title" directly involved in the transaction, viz: the then present right of entry. The admission made by the defendant of the plaintiff's title, whether studied or otherwise, in our judgment, amounts to nothing. *Allegans contra-ria non est audiendus*. A disseizor cannot qualify his own wrongs. (*Ricard v. Williams*, 7 Wheat. 59.) Exactly stated, the defendant admitted the right of property, which was several, and which no hostile action on his part could presently affect, but denied the right which was joint and which it was within his power to thwart, viz: the right of immediate possession. If the defendant had denied the several right of property and allowed the plaintiff to enter, no ouster would have resulted; and it follows that a mere verbal admission of that right cannot defeat an ouster wrought out upon other and sufficient grounds. "The defendant positively refused to let the plaintiff into possession," and therein he denied to the plaintiff the benefit of the title which he admitted to be fully vested in him.

There is a diversity of methods by which it may be proved that one co-tenant has been ousted by another, and that now in question is one of the number, and is not to be confounded with the others. The authorities are decisive, that when the co-tenant makes a proper demand, not for his share of the rents and profits, but to be let into possession, and the request is refused, and the tenant upon whom the demand is made continues in possession thereafter, such possession will be considered as adverse, even though there was no formal denial of

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title. The result of the cases is well presented in 2 Greenleaf's Evidence, Sec. 318: "An ouster in such case, therefore, must be proved by acts of an adverse character; such as claiming the whole for himself, denying the title of his companion, *or refusing to permit him to enter*, and the like.

The respondent insists that the demand made by the plaintiff was substantially defective, for the reason that the precise share of the plaintiff in the rancho was not stated. The answer of the defendant shows that he knew at the time his answer was filed, that the plaintiff owned an undivided half of the rancho as tenant in common with him; and the evidence tended to prove that he knew of the relation at the time of the demand, and that the plaintiff was the principal owner. If the defendant knew that he and the plaintiff were tenants in common, and that plaintiff was the principal owner, the jury, in view of those and the other facts in the case, might very well have concluded that the defendant knew the precise extent of the plaintiff's interest at the date of the demand, if the fact was material to be proved.

It is further insisted that the demand must be considered as abortive, for the alleged reason that the plaintiff demanded the sole possession of the premises—the demand made involving a notice to quit. The demand, so far forth as it was in writing, required the defendant "to let the plaintiff into possession," etc. The words "let into possession," when occurring in a connection like the one in which they were used, do not, in our judgment import a notice to quit; but if the question admits of any doubt, still it appears by the record that the plaintiff during his interview with the defendant stated to him verbally that he wanted "to be let into the possession of the land with the defendant," and "the defendant did not accede to said demand," but "positively refused to let the plaintiff into possession." When the written demand and the verbal explanation are considered in connection with each other, it is apparent, that the claim of the plaintiff was not for the sole but the joint possession of the premises demanded.

It is further insisted for the respondent that inasmuch as the

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Mexican grant under which both parties claim title was of two square leagues, to be located within certain exterior boundary lines, containing six square leagues, and inasmuch as no survey and location had been made before the commencement of the action, it cannot be considered that the defendant had been guilty of an ouster, even though all the legal views heretofore expressed in this opinion should be admitted or assumed to be correct.

It is urged that in *Ferris v. Coover*, 10 Cal. 590, and in *Mahoney v. Van Winkle*, 21 Cal. 552, the defendants were mere trespassers without title; and the point made, is, that a distinction should be taken between the case of a defendant with title and that of a defendant without title.

The parties are tenants in common. The defendant, in his answer, recognizes that relation as existing between himself and the plaintiff, and he cannot properly claim any right, or any exemption, except such as are due to him under the law by which that relation is governed. The defendant, by the rule of the relation, is entitled to possess the land, and every part of it, in common with the plaintiff; and the plaintiff has the right to possess the land, and every part of it, in common with him; but if either the one or the other prevents his associate from entering upon the land, or any part thereof, he performs an act which the law of the relation forbids, and the wrong would be none the less a wrong for the reason that it was perpetrated by a coproprietor. We do not find it at all essential to consider whether the original grant to Castro and Pacheco passed the legal title to them on the delivery of the grant. It is enough that it passed to the grantees an immediate and vested interest in the quantity of land therein specified, (*Fremont v. The United States*, 17 How. 542,) with the joint right to hold and possess to the larger boundaries until survey. (*Ferris v. Coover*, 10 Cal. 590; *Mahoney v. Van Winkle*, 21 Cal. 552; *Thornton v. Mahoney*, 24 Cal. 569.) In short, the record finds that the relation of tenants in common exists between the parties, and that it has existed since the 10th day of March, 1860. We must accept that relation as a

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fact, and our only office in error is to adjudge upon the rights of the parties by the tests which the law of that relation supplies.

Judgment reversed and new trial ordered.

ISAAC ROFF v. C. P. DUANE, W. G. ROSS, DANIEL HARVEY, FREDERICK HOOD, DANIEL DONALDSON, JOHN A. KELLEY, DANIEL SWEENY, AND PATRICK H. OWENS.

RENTS AND PROFITS IN FORCIBLE ENTRY AND DETAINER.—As the right to the possession of the premises is not in issue in an action for forcible entry and unlawful detainer, if it is found that at the time of the alleged forcible entry the plaintiff had the actual and peaceable possession, and that the defendants unlawfully detained the premises, the plaintiff is entitled to recover the monthly rents and profits during the time of the unlawful detainer, without regard to the nature or extent of the right or title by which he held the possession.

EVIDENCE IN FORCIBLE ENTRY AND UNLAWFUL DETAINER.—If D. and H. are in the peaceable possession of a lot of land, and S. and S., accompanied by others — their employes — forcibly evict them therefrom and take possession, and then lease the lot to R., who enters into peaceable possession, and five days afterwards D. and H., with others, forcibly dispossess R. and take possession, and R. brings an action of forcible entry against them, D. and H. cannot introduce evidence of their prior eviction by S. and S. in defense.

EFFECT OF STATING PURPOSE OF EVIDENCE.—If a document is offered in evidence, and the party offering it states that he offers it for a particular purpose, it must be confined in its effect as evidence to the purpose expressed when it was offered.

A LEASE IN FORM NOT SIGNED BY THE LESSOR.—A lease in form, which contains the name of one person as lessor in the body of it, and is signed by another person, and also the lessee, is not a lease, nor is it admissible in evidence in an action of forcible entry and unlawful detainer on behalf of the nominal lessee, (the plaintiff in the action,) for the purpose of showing the extent of the property which the plaintiff claims he possessed.

ADMISSION OF ILLEGAL TESTIMONY.—If illegal testimony is admitted by the Court below, and the appellate Court cannot determine whether the finding of the Court below was based on this or other testimony in the case, the judgment will be reversed.

APPEAL from the County Court, City and County of San Francisco.

The complaint averred that on the 11th day of May, 1863, the plaintiff was and for a long time had been in the peaceable

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possession of the land in dispute. Plaintiff testified that he went into possession on the 7th day of May, 1863, and was forcibly evicted by defendants on the eleventh of the same month. The instrument offered in evidence by plaintiff as a lease, was dated on the 7th day of May, 1863. It purported to lease the land to plaintiff for the term of one month from the 7th day of May, 1863. The action was commenced on the 27th day of May, 1863. October 19, 1863, the Court gave judgment for restitution of the entire tract of land, and for the monthly value of the rents and profits up to the day of rendition of judgment. The plaintiff testified on the trial that he went on to the premises in dispute under an agreement with Smith and Sullivan, but did not see or sign the paper purporting to be a lease, until the 9th day of October.

After plaintiff had rested, defendants' counsel called as a witness F. Hood, and offered to prove by him the following facts:

1. That the defendants, five or ten days prior to the alleged forcible entry in this suit, were in the quiet and peaceable possession and occupation of the premises described in the complaint in this action; and while in such possession, E. L. Sullivan and Charles K. Smith, being the parties referred to by Roff in his testimony, forcibly entered, and forcibly evicted these defendants therefrom; and also with force tore down and burnt the building by them occupied; and that the building from which Roff was evicted was erected by Sullivan and Smith within twenty-five yards of the house so burned by them.

2. That said Sullivan and Smith employed and paid parties fifty dollars each per day for tearing down and burning said building, evicting these defendants and holding possession against them, and that such employes were fully armed with deadly weapons for that purpose.

The counsel for the plaintiff objected to such evidence upon the grounds that it was immaterial, irrelevant, and constituted no defense to the action.

Argument for Appellants.

The Court sustained the objections, to which ruling the counsel for the defendants excepted.

The other facts are stated in the opinion of the Court.

Bennett, Cook & Clarke, for Appellants.

The counsel for the plaintiff stated that he "only offered the paper purporting to be a lease in evidence for the purpose of showing the extent of the property which the plaintiff claimed he possessed." The right of the plaintiff (if any he had) extended only over the land of which he had *actual* possession. He could recover nothing by virtue of *constructive* possession. (*Plume v. Seward*, 4 Cal. 94; *Lawrence v. Fulton*, 19 Cal. 684, 690.) This lease would be admissible only by reason of its relevancy for one of two objects; 1st — To prove title; 2d — To enable the plaintiff to recover *beyond* the limits of his *actual* possession. It was not relevant or admissible for either of these purposes; yet, by reason of its introduction, the plaintiff was enabled to recover to the extent of the boundaries therein specified, and far beyond any pretense of *actual* possession. Thus, this instrument was not only irrelevant, but its introduction has been positively prejudicial to the defendants.

The judgment for rents and profits is greater than the law authorizes. Roff, at the most, had the right of occupying the premises only for one month. The Court finds the monthly rents and profits to be twenty dollars. Roff's month commenced on the 7th day of May. It would terminate on the 7th of June. Yet the Court has given judgment for the rents and profits from the 11th of May to the 7th of October, being the sum of ninety-eight dollars. This sum of ninety-eight dollars the Court has trebled. This is manifestly all wrong. The plaintiff could have no claim for rents and profits after his interest or estate had ceased. According to the principle on which the Court rendered judgment, if the cause had not been "finally submitted" for five years, the Court would have gone on adding the monthly rents for the whole period, and then trebling the aggregate sum. Then Smith and Sullivan

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could have brought their ejectment, and again recover the rents and profits from the 7th day of June, 1863, down to the time of judgment.

Hoge & Wilson, for Respondent.

The lease was clearly admissible for the purpose of showing the nature and character of the plaintiff's possession, whether peaceable or otherwise, and the extent of that possession. The validity of the lease cannot be tried in this form of action, as this Court has repeatedly decided, and particularly in the case of *McCauley v. Weller*, 12 Cal. 528, 529. Nor is it perceived what right a mere intruder or trespasser has to question the validity of a lease as between the person in possession of lands and the owner under whom he takes that possession, and whose right he acknowledges; and particularly when in this case the owners all recognize the relation of landlord and tenant, and the validity of the lease. It is not for the wrongdoer to question the validity of the lease. That is a matter entirely between the parties to the lease, and cannot be raised in this action. The paper in question was offered, as such documents always are, to show the possession, its character, and extent. It was done in the case already cited, and in many others, and, as we think, is eminently proper in cases like these. The very case cited by the counsel for the appellants, of *Mitchell v. Davis*, 23 Cal. 382, decides the very point in our favor. If it were otherwise, it would not avail the defendants, as the evidence was ample without it, and it could not possibly have done the defendants any injury.

By the Court, RHODES, J.

This is an action of forcible entry and detainer. The County Court, on appeal, found for the plaintiff, and the defendants appeal from the judgment and the order denying a new trial. Several of the grounds assigned by the defendants on their motion for a new trial—that the judgment is against the evidence; that the plaintiff was a mere servant or

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hired man of Smith and Sullivan; and that the possession of the plaintiff was a mere scrambling possession—belong to the same general class and relate altogether to the weight or sufficiency of the evidence. The Court below found that the plaintiff was in the peaceable, actual and quiet possession of the premises, and that the defendants were guilty of the forcible entry and detainer complained of; and it is scarcely necessary to repeat that where there is any evidence of a fact in issue which is passed on by the Court below, and where the Court below has denied the motion for new trial based on the ground that the finding is contrary to the evidence, or to the weight of the evidence, or that the evidence is insufficient to support the finding, this Court will not reverse the order of the Court below, unless the order is manifestly an abuse of the legal discretion of the Court. The order in this case is not subject to that objection.

The defendants contend that the judgment for the rents and profits is greater than the law authorizes, because, they say, the plaintiff at most had the right of occupying the premises, according to his lease, only one month. The objection might be tenable if the object of the action was to determine the right to the possession of the premises, or to recover the rents and profits, the right to which depended on the right to the possession of the premises; but the right to the possession is not directly or incidentally in issue. The inquiry is, Had the plaintiff the actual and peaceable possession at the time of the forcible entry complained of? And if that issue and the unlawful detainer are found for the plaintiff the law awards to him the monthly value of the rents and profits during the time of the detention without regard to his right or title in the premises.

They make the further point, that the Court erred in excluding the evidence offered by them to prove that five to ten days prior to the alleged forcible entry they were in the peaceable occupation of the premises, and that Sullivan and Smith, the lessors of the plaintiff, forcibly entered and evicted them, and tore down and burnt the appellants' building, and

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employed and paid persons therefor and for holding possession against them, the employes being armed with deadly weapons for that purpose. Upon those facts, they were entitled to have instituted and maintained against Sullivan and Smith an action for the forcible entry and detainer, or an action of ejectment, if they had also the right of possession; but the forcible entry upon the appellants did not authorize them to seek redress by making a forcible entry upon the actual and peaceable possession of another. It was the object of the statute not only to prevent and punish the forcible entry of those having no right of entry, but also of those who, having a right of entry given by law, make entry "with strong hand," or "with multitude of people." The forcible entry of Sullivan and Smith is no justification of the forcible entry of the appellants upon the respondent. If the evidence offered had been admitted, it would not have constituted a defense to the action, for in addition to the reasons already given, there was no offer to show that the respondent participated in the alleged forcible entry of Sullivan and Smith, and his privity in estate with Sullivan and Smith would not render him directly or indirectly liable for their wrongful acts.

The appellants also assign as error, the admission in evidence of a document, purporting to be a lease of the premises to the plaintiff for one month. In the body of the lease, Charles K. Smith is described as the lessor, but it is not executed by him, it being signed by E. L. Sullivan and the lessee. The premises described in the lease, have the same name and number of acres and about the same boundaries as the tract described in the complaint. The signatures to the lease were admitted to be genuine signatures of Sullivan and the plaintiff. The defendants objected to the lease being given in evidence on the grounds: "1st — That it is incompetent, irrelevant and illegal testimony; 2d — That it was not a lease from Smith to Roff; 3d — That it was not a lease from Sullivan to Roff; 4th — That the paper in its body purported to be a lease from Smith to Roff, and that Roff never executed it; and 5th — That as a lease it was a nullity as between Smith and Roff." The

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counsel for the plaintiff thereupon stated that he only offered the paper in evidence "for the purpose of showing the extent of the property which the plaintiff claimed he possessed." The defendants renewed their objections to the document offered for the purpose stated, and the Court overruled the objections and allowed it to be read in evidence, and the defendants excepted.

The plaintiff now insists that the lease was admissible "for the purpose of showing the nature and character of the plaintiff's possession, whether peaceable or otherwise, and the extent of that possession. If it was admissible for any purpose, it must be confined in its operation to the purpose expressed when it was offered. Is it admissible for that purpose? It evidently is not the lease of Smith, nor is it the lease of Sullivan, for Smith does not sign it, and Sullivan does not profess to make it. It does not amount to a lease, and is no more in substance than the document would have been if there had been a blank where Smith's name appears, and there had been no signature but that of the intended lessee. It thus becomes unnecessary to determine whether a lease made between Smith or Sullivan as the lessor, and the plaintiff as the lessee, would have been admissible as evidence to prove the extent of the premises claimed by the plaintiff, for the record does not present that question. The question is, in substance, whether a draft of a lease unexecuted by the lessor is competent evidence to prove the extent of the land claimed by the nominal lessee. The plaintiff did not enter under that document, nor did he profess to have done so, and he does not pretend to have seen it until several days after his entry on the lands. The point that the defendants, being wrongdoers, have no right to question the validity of the lease has no force, because the document is not in fact a lease. We are clear that the document was not admissible for the purpose for which it was offered, for a paper, in form a lease, to be executed by both lessor and lessee, but in fact executed by the lessee alone, does not tend to extend, limit or define the boundaries of the lands held or claimed by the nominal lessee. We cannot say that because

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the remaining evidence was sufficient to authorize the Court to find for the plaintiff, therefore the error in admitting the lease became immaterial, for it is impossible for us to ascertain whether the Court found that the plaintiff was in the possession of the whole premises sued for or any part thereof, from the lease or from the other testimony in the case.

Judgment reversed, and the cause remanded for a new trial.

Mr. Chief Justice SANDERSON expressed no opinion.

THE PEOPLE v. THOMAS B. POOL.

JUSTIFICATION OF A HOMICIDE.—The right to take life in defense of one's person, habitation, or property, or for the protection of those whom by the law of nature he is bound to protect, is founded on necessity; and when this defense is interposed in justification of a homicide, the first inquiry is as to the alleged necessity.

SAME.—If an officer in fresh pursuit of criminals comes suddenly upon several of them, and calls out "You are my prisoners—surrender:" and at the same time points a gun towards them, they are not justified in firing on him, or in taking his life.

SAME.—If several persons commit a robbery, and immediately flee from the scene of it, and are pursued soon after by an officer, who overtakes them at a distance of ten or twelve miles from the place where the crime was committed, and is slain by them in an attempt to arrest them, on the trial for the homicide the People may introduce evidence of the robbery, and the defendant's connection with it.

PROOF OF INTENT WITH WHICH HOMICIDE WAS COMMITTED.—In ascertaining the degree of guilt of one who has committed a homicide, it is important to determine the intent with which the act was done. The intent may be proved by evidence, direct or circumstantial, tending to establish the fact.

ACT OF ONE CONSPIRATOR THE ACT OF ALL.—If several persons conspire together to commit a robbery, and to resist arrest even to the taking of life, and after the robbery is committed take the life of an officer in resisting an arrest, whatever is said or done by any one of them in furtherance of the common design is a part of the *res gestæ*, and the act of all.

NOTICE BY AN OFFICER OF HIS OFFICIAL CHARACTER.—Where a party is apprehended in the commission of an offense, or upon fresh pursuit afterwards, notice of the official character of the person attempting to make the arrest, or of the cause of the arrest, is not necessary.

ARREST WITHOUT A WARRANT.—A peace officer may, without a warrant, arrest a person for a felony he has committed—though not committed in the officer's presence—when the criminal is fleeing from the scene of the crime.

SAME.—The words "when he is pursued immediately after an escape" in the one hundredth and thirty-seventh section of the Practice Act, are not used in the sense of an escape from custody, but in the sense of flight from the

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scene of the crime; and the words "immediate pursuit," are the same as "fresh pursuit" used in common law phrase in criminal cases.

WHAT IS IMMEDIATE OR FRESH PURSUIT OF CRIMINALS.—If, after the commission of a felony, the guilty parties flee to avoid an arrest, and within three or four hours are pursued by officers for the purpose of apprehending them, and the officers by diligent pursuit overtake them at a distance of twelve miles from the place where the crime was committed, this is an immediate or fresh pursuit of the criminals.

STATUTE DEFINING MURDER IN THE FIRST DEGREE.—The adjectives "wilful," "deliberate," and "premeditated," considered in connection with the context in the phrase "or for any other kind of wilful, deliberate, and premeditated killing," found in that section of the Act concerning crimes and punishments defining murder in the first degree, are merely cumulative and expressive of the same idea.

ROBBERY.—If the Court in its charge to the jury characterizes the crime of robbery as an "outrage," it is not calculated to prejudice the cause of the defendant, or do him an injury.

CHARGE TO JURY AS TO THEIR VERDICT.—To charge the jury that they "have the power to find the defendant guilty of murder in the first degree, murder in the second degree, or manslaughter, or not guilty," is the same in effect as to charge them that it is their province so to find.

DEFINITION OF MURDER.—Each of the phrases, "wilful killing," "deliberate killing," and "premeditated killing," standing in relation to the offense of murder, embraces, essentially, the legal idea of the other.

APPEAL from the District Court, Eleventh Judicial District, El Dorado County.

The facts are stated in the opinion of the Court.

James Johnson, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, CURREY, J.

The defendant was indicted with others for the murder of Joseph M. Staples, committed on the first day of July, 1864, at a place called Somerset House, in El Dorado County. The defendant plead not guilty. On the trial it was proved that at about ten o'clock of the evening of the day previous, the defendant with thirteen other persons stopped two stage coaches which were on their way from the then Territory of Nevada to Placerville, in the County of El Dorado, and by violence took from one of them a large amount of gold—gold coin and bullion—which was in the custody of the person

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having charge of the coach in which the same was when taken. The scene of the robbery was about twelve miles from the Somerset House, and about fourteen miles from Placerville. Soon after the stage coaches arrived at the latter place, and the deceased, who was a Deputy Sheriff of El Dorado County, became informed of the robbery, he and a constable started in pursuit of the robbers, and at about five o'clock the next morning came upon some of them at the Somerset House, where they were together in a room, and finding a gun standing at the door of the room the deceased took it into his possession, and then opening the door addressed the defendant and his companions, saying to them: "You are my prisoners — surrender;" and at the same time pointing toward them the gun which he held in his hands, while they, on their part, instead of surrendering, drew their pistols and opened fire on the deceased. Several of the shots took effect upon a vital part of his body, causing his death in a few minutes. After the firing had been commenced by those in the room, the deceased shot the defendant, by which he was disabled.

The defendant was found guilty of the murder of Staples, and was sentenced to be executed. From this judgment he has appealed, and counsel on his behalf asks this Court to reverse the judgment on several grounds, which we have carefully considered, and concerning which we will now pronounce our judgment.

I. It appears from the evidence in the case that Staples did not, at the time he attempted to arrest the defendant and his companions, inform them in terms of his official character, nor the cause for the attempted arrest, and it is therefore argued on the defendant's behalf that the homicide was justifiable.

A false and mischievous notion seems to have obtained to a considerable extent that a person may justify or excuse the slaying of his fellow being for causes which fall far short of any exigency from which it may be lawfully presumed the act of the slayer was necessary for the defense of his person, habitation, or property, or for the protection of those whom by

the law of nature he is bound to protect and defend. The right of defense in the cases indicated is founded on necessity, and when sought to be interposed in justification of the act, the first inquiry is as to the alleged necessity. Then, were it assumed that the defendant and the men with him were innocent of the crime for which the deceased sought to arrest them, and ignorant of his official character, could it be said they were justified by the circumstances which transpired in taking his life? He had it in his power to shoot, at the moment he informed them that they were his prisoners and demanded their surrender, and yet he did not exert such power; besides which, his language and menace, as associated, was calculated to convey the idea that he did not design violence if they would heed his demand. The circumstances, in our judgment, did not, even on the hypothesis stated, justify or excuse the taking of the life of the deceased. But whether the crime committed was of the magnitude of murder in the first degree, depends upon the entire circumstances of the case.

The defendant objected to the evidence offered and given at the trial in relation to the robbery, and now insists that the Court erred in permitting any examination as to that offense and the defendant's connection with it. In our view of the matter it was material for more reasons than one:

First—To show that the defendant was engaged in the commission of the robbery, and that he and his confederates had a motive beyond their own protection, as men innocent of crime, in killing the deceased while in pursuit of them.

Second—To show that in connection with their criminal purpose, they had agreed to resist being arrested even to the death, and that being confederated together for the felonious purpose of robbery and resistance to the civil power of the State, the killing of the deceased, by whichever of them actually done, was the act of each and all of the conspirators.

Third—To establish a condition of circumstances from which the robbers would be deemed to have sufficient notice that their pursuers were officers of the law, or citizens in pursuit of them as malefactors.

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(1.) In ascertaining the degree of guilt of one who has committed a homicide, it is always important to ascertain the *animus* with which the act was done. It is the intent with which an act was done that constitutes its criminality. The intent and act must both concur to constitute the crime. And the intent must therefore be proved. The proof may be either by evidence, direct or indirect, tending to establish the fact, or by inference of law from other facts proved. (3 Greenleaf's Ev. Sec. 13; 1 Bish. Cr. Law, Secs. 253 to 257; *Fowler v. Padget*, 7 Term R. 514.) Whenever it is important to determine the character of the act perpetrated and to ascertain the intent of the accused, the existence of any motive likely to instigate him to the commission of the crime may be proved, and is relevant and competent for the purpose of fixing or tending to fix the crime upon him. (1 Stark. Ev. Secs. 13 and 14; Wharton's Cr. Law, Secs. 635 and 850.)

(2.) By the act of the defendant's conspiring with those who were with him when the deceased was slain, to commit robbery and to resist arrest even to the taking of life, they jointly assumed to themselves, as a body, the attribute of individuality, so far as regarded the prosecution of the common design, thus rendering whatever was done or said by any one of them in furtherance of that design a part of the *res gestæ*, and therefore the act of all. (3 Greenleaf's Ev. Sec. 94.)

(3) Where a party is apprehended in the commission of an offense, or upon fresh pursuit afterward, notice of the official character of the person making the arrest or of the cause of the arrest is not necessary, because he must know the reason why he is apprehended. Cases are not wanting to support this doctrine. In the case of *Rex v. Davis*, 7 Car. and Payne, 785, where it appeared that a gamekeeper, with a servant of his master, were out at night and heard two guns fired, and went toward the place and got into a covert and saw some men there, who ran away, and the servant pursued them and got close up to one of them and attempted to arrest him, and was immediately shot through the side, Baron Parke said: "Where parties find poachers in a wood, they need not give any inti-

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mation by words that they are gamekeepers or that they come to apprehend; the circumstances are sufficient notice. What can a person poaching in a wood suppose, when he sees another at his heels?" So in the case of *Rex v. Whithorne, Perry and Smith*, charged with the murder of Richard Rounce, (3 Car. & P. 394,) it appeared that Rounce, with other gamekeepers, found Perry and Smith out for the purpose of catching hares and arrested them. The persons so apprehended soon after called to Whithorne, who came up, and with a stick shod with iron, beat the gamekeepers on the head, killing Rounce, and rescuing Perry and Smith. For the prisoners it was objected, that as the gamekeepers did not announce to the prisoners who they were, the arrest was illegal, and further, that as their duty was to apprehend merely, and it was in proof that they beat the prisoners, that would reduce the offense to manslaughter. To this the Court answered that with respect to the keepers not announcing who they were, there was no pretense for saying the prisoners did not know that perfectly well. They did not make any question of their authority. They did not say, "You have no right to take us, Who are you?" or anything of that sort. The apprehension was legal, and being so, all the legal consequences must follow. So also in *Rex v. Payne*, 1 M., C. C. R. 378. Certain gamekeepers, upon hearing the report of guns, went towards the place from whence the sound came. The prosecutor saw six persons in the wood who were poachers, and with a cocked pistol ran after them as they ran away. After running about fifty yards, they made a stand. One of them shot the prosecutor while he was pursuing. The prosecutor said nothing to them nor they to him before he was shot. At the trial for maliciously wounding the prosecutor, it was objected for the prisoners that inasmuch as the prosecutor's authority to apprehend the prisoners was derived from the Act creating the offense for which he attempted to arrest them, it was incumbent on him to give them notice of his authority. The objection was overruled, and upon a case reserved, the Judges

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were of opinion that the circumstances constituted sufficient notice.

In the case of a public officer such as a Sheriff or a constable, acting in his own district, his authority to make arrests of persons who have recently committed crimes, is to be deemed a matter of notoriety. (Roscoe's Cr. Ev. 754.) The robbers were in the act of fleeing with a portion of the spoils of their crime committed several hours previous, and the deceased and the constable with him were at their heels in fresh pursuit. The circumstances of having committed the crime of robbing the stage coach was sufficient to cause them to apprehend pursuit. That they were aware they were pursued appears by the evidence of one of the party, who testified that Bulwer, one of the robbers, who occupied another room, came to the room in which the defendant and others were, and waked them and told them to get up — that somebody was after them. This was just before the deceased came to the door. After Staples was killed the firing was kept up until the constable surrendered. It was after this the constable told them he was an officer, and they demanded of him to show his authority, and asked him "How in hell did you find us so soon?" The deceased, upon entering the door where the defendant and his confederates were, addressed them, "You are my prisoners — surrender." These words were, according to the authorities, a sufficient notice of his character as a peace officer. (Roscoe's Cr. Ev. 755; 1 Russ. on Crimes, 627; 1 Hale's Pleas of the Crown, 461; *Mackalley's Case*, 9 Coke R, 68 b, and 69 a.)

It is provided by statute that a peace officer may, without a warrant, arrest a person for a felony which he has committed, though not committed in his presence; and also where a felony has in fact been committed, and the officer has reasonable cause for believing the person arrested to have committed it. (Laws 1851, p. 226, Sec. 134.) The one hundred and thirty-seventh section of the same statute provides that when arresting a person without a warrant, the officer must inform him of his authority, and the cause of arrest, except when he is in the actual commission of a public offense, or when he is pursued

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immediately after an escape. The word *escape* we do not understand to be used in the technical sense of an escape from custody, but rather in the sense of flight from the scene of the crime to avoid being arrested and brought to justice. Even a private person may arrest one who has committed a felony, without a warrant and without informing him of the cause thereof, provided such arrest be made on pursuit immediately after the commission of the offense. (Laws 1851, p. 227, Sections 140, 141.) It would be strange indeed if conditions, stricter and more ceremonial, were imposed on peace officers in such cases than upon private persons. What is meant by pursuit immediately after an escape or immediately after the commission of the offense? Immediate pursuit is substantially the same as fresh pursuit, so frequently used in common law phrase in criminal cases. The phrase "when he is pursued immediately after an escape," is not to be taken so strictly as to defeat its reasonable operation. (1 Russ. on Crimes, 606, 607.) The interval which may elapse between one event and another may, in a particular instance, be sufficient to destroy their relations as immediate in time, while as to two other events the same interval would not have such effect. For example, if one living near the Post Office should call there for a letter and there remain an hour before his return to his own place, it could not be said he returned immediately; but if he should visit a foreign country, and there remain only for a few days and thence depart on his return homeward, it might with propriety be said his return was immediate. Thus it is seen that immediate is a word of relation, and as a measure of time is itself governed in degree by the events and circumstances to which it stands in a qualifying connection.

The conclusion to which we come upon the questions considered are:

1st. That the crime of robbery was committed by the defendant and others, and that the deceased and the constable with him were in the immediate or fresh pursuit of the robbers, for the purpose of apprehending them for the felony they had perpetrated, when the homicide was committed.

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2d. That the defendant and his companions in the crime of robbery were aware at the time of the cause for which they were pursued, and had in legal contemplation notice of the character of their pursuers.

3d. That the testimony, taken as true, established the fact that the defendant as a conspirator with others to commit the crime of robbery, and to resist apprehension therefor even to the taking of life, was concerned in the unlawful killing of the deceased, Joseph M. Staples, while in the discharge of his duty as a peace officer in the County of El Dorado, and that the circumstances of the homicide showed that the act was done with an abandoned and malignant heart.

II. The defendant complains that the charge of the Court to the jury was erroneous in several important particulars, by which his cause was or may have been prejudiced. If this be so, the judgment should be reversed, notwithstanding the evidence, under proper instructions, might be deemed sufficient to support a verdict of guilty of murder in the first degree.

(1.) In defining murder in the first degree the Court charged the jury that "all murder which shall be perpetrated by means of any poison, or lying in wait, torture, or any other kind of wilful, deliberate or premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, is murder of the first degree. All other kinds of murder shall be deemed murder of the second degree." This charge is substantially in the language of the statute, except that the words "wilful, deliberate and premeditated" are disjoined by the word "or," instead of being conjoined by the conjunction "and," as in the statute. The effect of the charge in this particular is that either a wilful, deliberate or premeditated killing of a human being is murder in the first degree. These adjectives are severally expressive of the same idea. An act done wilfully is done designedly or of set purpose; an act performed deliberately is performed with careful consideration or after examination and reflection; and an act premedi-

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tated and then committed must be understood to be preconcerted, intended or meditated beforehand. In the sentence referred to, the words "wilful, deliberate and premeditated," as connected with the subject to which they relate, if intended to be conjoined, may be regarded as cumulative, and merely giving force to the subject matter by successive expressions of the same idea. In 1 Wharton on Criminal Law (Sec. 1,084) it is said: "In Pennsylvania, New Jersey, Virginia, Alabama, and Michigan, the killing, to commit murder in the first degree, must be 'wilful, deliberate and premeditated.' The omission of 'wilful' in New Hampshire, and the addition of 'malicious,' in Tennessee, cannot, it is apprehended, vary the construction given to the statutes." (*Dale v. The State*, 10 Yerg. 551; 1 Whart. Cr. Law. Secs. 1,085, 1,114.) But the word *and* is not always to be taken conjunctively. It is sometimes, in a fair and rational construction of a statute, to be read as if it were *or*, and taken disjunctively; and in the statute referred to, the several words characterizing a particular homicide being used in substantially the same sense, may be read disjunctively. (Smith's Com. on Statutes, 732.) The substance and effect of the statute is to be regarded and not every unimportant matter of form or circumstance. *Quæ hæret in litera hæret in cortice.*

(2.) In the course of the charge to the jury the Court said: "If several persons conspire together to seize with force and by robbery, treasure or property belonging to another, and escape with it, and if necessary, to kill any person who shall oppose them in the execution of the design, and death ensue in the prosecution of the design, it is murder in all who are present aiding and abetting in the common design. The law makes no difference or distinction between any of the parties engaged. All engaged in such an *outrage* are aware that their acts are unlawful, and that murder may result from such resistance, and all alike must suffer the consequences."

It is objected on behalf of the defendant that characterizing the commission of the acts stated by the Court in the form of a postulate an *outrage* was calculated to prejudice the cause

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of the defendant; but it is difficult to see wherein, for certainly to denominate the crime of robbery an outrage is a mild designation, which in no sense could do the defendant an injury.

(3.) After the Court had charged the jury respecting the law of homicide generally, and after having especially distinguished between the different degrees of crime in cases of criminal homicide, the Court instructed the jury as follows: "Gentlemen of the jury: Under this indictment you have the power to find the defendant guilty of murder in the first degree, murder of the second degree, or manslaughter, or not guilty."

The defendant's counsel objects to the word *power* as used in the portion of the charge here quoted; and it is argued that the instruction that the jury had the power to find as stated, implied that they might, or that it was their province, to render a verdict of guilty of either of the offenses specified, regardless of evidence. If such be not the force of the objection then it is without meaning and senseless. The charge would have been the same in effect if the Court had told the jury it was their province to find the defendant guilty of any one of the offenses specified, or not guilty.

(4.) The portion of the charge following the passage last quoted, in these words: "The law, however, makes all murder committed in the perpetration or attempt to perpetrate robbery, murder of the first degree," is also objected to as amounting to an instruction that the killing of Staples was a murder committed in the perpetration or attempt to perpetrate a robbery, and was for that reason murder of the first degree.

This objection, in our judgment, is not well taken, for the reason that the words are not fairly susceptible of the construction given them on the part of the defendant. The language of the Court here used must be understood as it stands related to other portions of the charge, and it is to be presumed the jury understood it as thus related.

III. The defendant requested the Court to instruct the jury in the following words: "If the jury believe from the evi-

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dence in the case that the deceased, Staples, presented himself at the door of the room occupied by defendant Pool and his confederates, and presented a gun at them and demanded that they surrender to him, but did not inform them of his official position or authority to arrest them, or the cause of their arrest, and at the time the gun was pointed at them they had offered no violence to him, and they were ignorant of his official character, and that the killing took place immediately after the gun was presented to them first and while it was levelled upon them, then the killing was no murder." The Court refused to so instruct the jury, and the defendant excepted.

The questions of law involved in the language of the requested instruction have been quite fully considered already. To have charged that the killing was no murder, provided the facts were as hypothetically stated, would have ignored the existence of other facts and conditions (concerning which there was evidence before the jury), which, in some degree at least, were of the elementary conditions giving character to the acts and intentions of the defendant and his confederates, and upon which, to some extent, depended the criminal quality of the acts which were the immediate cause of the homicide. The requested instruction proceeds upon the hypothesis that the facts stated were the only material facts affecting the question of murder in the case, and because of this, if for no other reason, the request was properly refused. There was testimony in the case of other material matters, which, if true, and taken into consideration by the jury, might very properly have had their influence in determining the jury as to their conclusions respecting the character of the homicide, and whether the defendant was guilty of murder or otherwise, or not guilty of any crime at all.

We have carefully considered every point on which the defendant has relied for a reversal of the judgment, with a solemn sense of our duty in a case on the determination of which the life of a fellow creature depends, and the conclu-

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sion to which we have come is that the judgment should be affirmed.

The judgment is therefore affirmed, and the District Court is directed to appoint a day for carrying the judgment pronounced in that Court, and now affirmed, into execution.

Mr. Chief Justice SANDERSON expressed no opinion.

By the Court, SAWYER, J., on petition for rehearing.

In the petition for rehearing, the counsel for appellant strenuously argues, that the substitution of the word "or," in the place of "and," in the phrase "wilful, deliberate and premeditated killing," constituting a part of the statutory definition of murder in the first degree, is a fatal error. He insists that the three words, "wilful, deliberate and premeditated" are not synonymous in meaning, and that the definition of murder in the first degree submitted to the jury was essentially, and materially different from that contained in the statute. It needs no argument to show that these several words, abstractly, and separately considered, are not synonymous. But we are not to consider them separately, or abstractly. They are to be considered in connection with the context. In discussing the question, a murder must be assumed to have been proved, and this fact must be considered as one of the conditions of the problem. For, unless there is a murder, no question can arise as to the degree of the murder, and the instruction bears upon the question of the degree only. The offense being murder the question is, not what does the word "wilful," or "deliberate," or "premeditated," mean, but what do the words "wilful killing," "deliberate killing," "premeditated killing," standing in relation to the offense of murder, signify? Can there be a "wilful killing," a "deliberate killing," or a "premeditated killing," without such killing embracing essentially the legal idea expressed by each of the other phrases? To determine this question it will be necessary to ascertain the legal signification

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of these several phrases, and upon an examination and analysis of the authorities upon the question as to the degree of murder, the result, we apprehend, will be found to be, that there is a "wilful killing," within the meaning of the statute, wherever there is simply a specific intent, a design or purpose formed to take life; that there is a "deliberate killing," wherever such intent or purpose is formed upon deliberation, or consideration, and the deliberation or consideration need not be for any particular period of time; a moment is as effectual as an hour or a day; and there is a "premeditated killing" wherever the deliberation or consideration precedes the purpose formed, and—as before stated with respect to deliberation—it need not precede the purpose formed for any particular period of time. In a late case in Tennessee (as quoted in 1 Whar. Crim. Law, Sec. 1,114,) the Court say: "It is true the Act says the killing must be wilful, deliberate and premeditated. But every intentional act is of course a wilful one, and deliberation and premeditation simply mean that the act was done with reflection and conceived beforehand. No specific length of time is required for such deliberation." Compare these well established legal definitions of the several phrases in question, and see if each does not necessarily imply all of the others? As to the phrase, "wilful killing," there seems to be no room for doubt. How is it possible for the mind to perform the operation of willing—of determining to do an act—of forming a purpose, without a preconsideration of the question? If A. determines to go to San Francisco, he must necessarily have thought upon the subject, considered the question, before he determined to go. And there would seem to be as little doubt, as to the other two phrases. A man may deliberate or meditate upon the subject of killing, and stop short of willing, or forming a purpose to kill. If he does stop upon the deliberation or meditation, without forming a purpose, he certainly will not kill, at least under such circumstances as will constitute the crime of murder. It seems as impossible to perpetrate a "deliberate *killing*," or a "premeditated *killing*," without first willing or forming the purpose to

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do the act, as to form the purpose without a preconsideration. If there is any appreciable, substantial, material element affecting the degree of the offense expressed, or implied, by one of these phrases, that is not necessarily implied by each of the others, we are unable to discover it; and this seems to be the opinion of Mr. Wharton, the author of a very learned and carefully prepared work on American Criminal Law. He says: "In Pennsylvania, New Jersey, Virginia, Alabama, and Michigan the killing, to constitute murder in the first degree, must be 'wilful, deliberate and premeditated.' The omission of 'wilful' in New Hampshire, and the addition of 'malicious' in Tennessee, cannot, it is apprehended, vary the construction given to the statutes. (Am. Crim. Law. 5th ed., Sec. 1,084.) If the omission of "wilful" cannot vary the construction, it must be because a deliberate or premeditated killing necessarily implies a wilful killing, and if the word "wilful"—the most comprehensive term, if there is any difference—can be omitted without varying the construction, certainly, either of the others can be dispensed with. Such being the case it is not material whether the word "or," or "and," be used. The word "malicious" evidently could not vary the construction, for the killing must be malicious to constitute murder in either degree. We may add, that the passage quoted may be regarded as expressing the matured opinion of the author, for it is also found in the earlier editions of his work on Criminal Law. Thus, after this work has been for several years before the public and subjected to the criticisms of Courts and the legal profession, it is still retained in the fifth and last edition. The language in the statutes of Virginia is the same as in our own. Yet, in *Jones' Case*, 1 Leigh, 654, Mr. Justice Daniel, who delivered the opinion of the Court, in his frequent repetitions of the clause in question, uses the words "or," and "and," indiscriminately. The exact point was not under consideration as to the effect of the use of these different words, and of course the case is not authority upon the point now before us. But it shows, at least, that it did not occur to the learned judge at the time, that the two phrases did not sub-

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stantially express the same legal idea. Mr. Chief Justice Hornblower—as quoted in Wharton's Law of Homicide, 382—commenting upon the statutory provision in New Jersey—which is the same as ours—says: “Again, the premeditation or intent to kill need not be for a day, or an hour, or even for a minute. For if the jury believe there was a design, a determination to kill, distinctly formed in the mind at any moment before, or at the time the pistol was fired or the blow was struck, it was a wilful, deliberate and premeditated killing, and therefore murder in the first degree.” Now, here it is said, substantially, that “a design, a determination to kill, distinctly formed in the mind,” followed by the act of killing, embraces all the elements required by the statute to constitute murder in the first degree. It is scarcely within the range of possibility that the inadvertent use of the word “or,” instead of “and,” in the charge of the Court—whether upon a critical analysis it shall be found to express precisely the same idea or not—could have had the slightest influence upon the verdict.

Upon the case disclosed by the record, there cannot be a shadow of doubt that the prisoner was in fact guilty of murder in the first degree. Nevertheless, if it had appeared that any error had been committed, which rendered it even in a remote degree probable, that the verdict could have been in any way affected by it unfavorably to the defendant, we should feel it our duty to reverse the judgment. We cannot perceive that there is any substantial material difference in the legal construction to be given to the phrase contained in the charge, and that embraced in the statute, or that any injury could have resulted to defendant. We see no other point in the petition that requires further discussion.

Rehearing denied.

Mr. Chief Justice SANDERSON expressed no opinion.

BENJAMIN DORE, AND OWEN HANNIGAN, INTERVENOR v. JOSEPH SELLERS, E. L. GOLDSTEIN, AND ADOLPH ZURN.

LIEN OF CONTRACTOR ON BUILDING.—The statute gives one who has entered into a contract in writing to construct a building a lien on the same as security for the payment of the money becoming due to him according to the terms of the contract, but this lien cannot be enforced for an amount exceeding the sum to become due the contractor.

CONTRACTOR HAS NO LIEN EXCEPT FOR MONEY TO BECOME DUE.—If a contractor engages to construct a building in consideration—in whole or in part—of a debt then due from him to the employer, or of a sum paid him by the employer upon the execution of the contract, that portion of the contract price represented by the debt or the advance payment cannot become a lien upon the building.

LIEN OF EMPLOYEES OF CONTRACTOR.—The employees of the contractor have no lien on the building as principals, and cannot acquire a lien on the building independent of the one existing on the original contract, which they may enforce to the amount due them, so that the same does not exceed the sum for which the contractor has a lien.

LIEN OF EMPLOYEES OF SUB-CONTRACTOR.—If the contractor has paid the sub-contractor according to the terms of his contract with him, and has not made premature payment, the employees of the sub-contractor are not entitled to demand anything from the contractor or employer.

SAME.—The employees of the sub-contractor cannot intercept any money due from the employer to the contractor, nor can they enforce the lien of the contractor for any of the same, beyond what is due from the contractor to the sub-contractor at the time.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the Court.

J. McM. Shafer, for Appellants.

The question presented is simply this: Can the material man and laborer go upon the house, superstructure, etc., directly, to the extent of the contract price due, or are they subject to all the conditions which may be created by the account between the contractor and his sub-contractor?

The eighteenth section of the Mechanics' Lien Act provides that the procurement of lumber to be used in erecting buildings with the intent to apply the same to other purposes, is an offense punishable as a crime. The fraud consists in inducing

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one to part with his property upon the faith that it will be incorporated into a permanent and valuable form of real estate, which the builder can resort to as a reasonably certain source of payment.

Section four makes the lien of the material man operative from the time the materials were furnished. At this time no work would have been done, no payments made nor due. The lien depends upon the fact that the lumber is furnished alone, and *not* upon the state of the accounts between the several parties. If it be conceded that the lien will be defeated by the non-application of the lumber for the purpose designed, still *this case shows the lumber was so applied.*

This intention of making the security of the material man absolute, is further shown by section sixteen. The lumber furnished is not attachable as the property of either the contractor or sub-contractor. It is regarded as a *trust to be executed exactly according to its terms*, and for the benefit of the material man.

No distinction is taken between the case of lumber furnished to a contractor and that furnished to a sub-contractor. *All* lumber furnished for the building is protected from attachment or execution against its "purchaser."

If the sub-contractor should have a recovery against him in favor of the contractor for breach of the building contract, lumber furnished for the building would be protected from an execution thereon. Why, then, should the vendor who sold this lumber charged with the trust be deprived of his pay and his lien, which is co-extensive with this trust, by the simple breach of the sub-contractor's contract?

Section thirteen secures the rule of superiority and priority to us, as against *both* Giblin and Zurn & Hannigan, and provides for the marshalling and application of the contract price, first to us, second to the sub-contractor, and third to the original contractor. The intention of observing this order is involved in section twenty-five. The limitation of time to make claim is thirty days as to these "primary" claims, while

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to those last in order of payment sixty days is allowed to initiate proceedings to enforce the remedies of the statute.

The foregoing ideas we think are sustained fully by *Cahoon v. Levy*, 6 Cal. 295; *Soule & Page v. Dawes*, 7 Cal. 574; *McGreary v. Osborne*, 9 Cal. 119; *Crowell v. Gilmore*, 13 Cal. 56; *S. C.* 18 Cal. 370; *McAlpine v. Duncan*, 16 Cal. 126; *Bowen v. Aubrey*, 22 Cal. 566.

E. B. Mastick, for Respondent.

The sub-contractor is entitled to recover only upon performance of sub-contract. All persons claiming through a sub-contractor can only claim that to which he would be entitled. The material man in this case derives his rights through the sub-contractor; the power of the sub-contractor is limited to the terms of his contract; he can confer no greater power than that which he has. The material man may come between the sub-contractor and the contractor, and intercept that to which the sub-contractor would be entitled; but how or by what right could he get more?

The question as put in appellant's brief, I think is not the question in this case. Has the material man who supplied material to a sub-contractor, a lien on the house, etc., for the material thus furnished, in case the sub-contractor fails to perform his contract, and has, up to the time of the notice to the owner, been paid all that was due of the money earned under his contract, and when all the money which is to become due under the original contract remains to be earned?

The appellant says that "the material man is entitled to a lien, etc., and the only limitation to the right is, that the owner of the realty shall not pay more, etc., than what he agreed to pay." Also: "The limitation of this right as against the defendants is, that they shall not be made to pay more than they have agreed."

Again: "The lien to be pursued is measured by the 'original contract,' for the reason, as we have seen, that Sellers and Goldstein ought not to be charged beyond their contract."

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Now, "all that was due" has been paid; all that was to become due "remained to be earned." There was no money due at the time of the notice. "All that was then due," that is, had been earned, had been paid to Zurn and Hannigan, and that which was to become due, "remained to be earned." It was afterwards earned by Giblin, and earning it, he was entitled to it. Neither the material nor labor of the appellants earned it, but the material and labor of Giblin did.

If, then, the liability of the owner is bounded by the amount named in the contract as the price, how are the appellants to recover? (*Bowen v. Aubrey*, 22 Cal. 566.) If any other rule was to prevail, then the owner would be liable for all materials and labor, regardless of the contract price.

By the Court, RHODES, J.

This action is brought under the Mechanics' Lien Act of 1862. Sellers and Goldstein, being the owners of a certain lot in San Francisco, contracted in writing with Giblin for the construction of two houses for a price named, payable in instalments. Giblin contracted in writing with Zurn and Hannigan to do the carpenter work on the buildings and furnish the materials for the work. On the 12th of January, 1863, the sub-contractors gave notice to the contractor and the architect, that they could not complete their contract, and they then abandoned the work. The contractor, up to that time, had paid to the sub-contractors all that was due them for work done and materials furnished by them, and it is not alleged and does not appear that a further sum was to become due to them, for work done or materials furnished before that time. On the 15th of January, 1863, the plaintiff served upon the owners of the premises and the contractor, a notice of his claim as a material man, for lumber, etc., furnished to the sub-contractors for the erection of the houses, the bill for which was on the 13th of January, 1863, certified by the sub-contractor to be correct. Upon the sub-contractors abandoning their contract, the contractor (Giblin) proceeded to complete

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the buildings, including that portion of the work uncompleted under the sub-contract; and at the time they abandoned their contract five thousand eight hundred and sixty dollars, as appears by the stipulation of the parties, "remained to be earned and paid upon the original contract as between the original parties (said Giblin, Goldstein and Sellers,) in two instalments—one of fifteen hundred dollars, and the last of four thousand three hundred and sixty dollars—to be paid on completion of the job. Fully completed March 20, 1863." The plaintiff sued to enforce his lien upon the lot as a material man, and he makes as defendants the owners of the lot and the sub-contractors.

The intervenor's position is similar in all respects to that of the plaintiff. The defendants had judgment in the Court below.

The appellants state the question involved in the case as follows: "Can the material man and laborer go upon the house, superstructure, etc., directly to the extent of the contract price due, or are they subject to all the conditions which may be created by the account between the contractor and his sub-contractor?" and in solving this question they lay down the proposition that, under the Mechanics' Lien Law, the material man and laborer are entitled to a lien upon the premises, as principals, subject to the limitation only, that the amount of such lien shall not exceed the price agreed to be paid by the owner of the real estate to the original contractor for the whole work. If this proposition can be maintained, the question must be answered in the affirmative.

The securing of liens to certain classes of contractors, mechanics and material men, for the value of the labor and materials furnished by them in the construction or repair of buildings and certain other structures, has been a favorite subject of legislation in this State, and remedies have been afforded to them, differing in material respects from those granted to other classes performing apparently equally meritorious services. The Act of 1862, which went to a greater extent in giving liens where none had been directly contracted for by

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the parties, superseded all former statutes on that subject. It is provided by section one that original contractors shall have a lien to the extent of the original contract price, and that such contract shall operate as a lien in favor of the sub-contractors, laborers and material men; and it is declared in section three, that the lien created by such contract "shall be and inure primarily to the benefit of all persons who, as employés of the original contractor, or [of] his assigns, shall perform work and labor, or furnish material for the construction or repair of such building," etc.; and that "after the payment of such material men, workmen and laborers, such lien shall inure to the benefit of the original contractor or his assigns." Sections one, three, and seventeen, are the only ones in the Act that declare the liens that the several classes of persons may acquire under a contract for the construction of a building, the other sections having relation to that general subject, prescribe the manner of acquiring, enforcing and satisfying such liens.

The statute grants to the contractor who has entered into a contract in writing to construct a house, a lien upon the house while it is being constructed, and for a limited time after its completion, as security for the payment of the money becoming due to him, according to the terms of the contract. Although the language of section one is that he shall have a lien "to the extent of the original contract price," it could not have been the intent of the Legislature, and it certainly was not within their power to give a lien for an amount exceeding the sum to become due to the contractor. For if the contractor engages to construct the house in consideration, in whole or in part, of a debt then due from him to his employé, or of a sum of money paid to him by the employé, upon the execution of the contract, that portion of the original contract price represented by the debt or the advance payment, could not become a lien upon the house. The amount of the contract price which is to be paid to the contractor becomes a lien upon the house as the same falls due according to the terms of the contract, and it is this lien that

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the statute declares shall inure primarily to the benefit of the employés of the contractor. No lien is provided for them by the statute other than such as arises under and flows from the original contract, and no other or greater lien could by legal possibility inure to their benefit, without subjecting the employer to a contract that he never made. The law does not create one lien for the benefit of the contractor and another for the benefit of his employés, but the lien arises, as the contract is performed according to its terms, for the benefit of both contractor and employés; and the law in enforcing the lien and distributing the sum realized, prefers the employés to the contractor—in other words, the law permits the employés to intercept a portion or all of the sum that was agreed to be paid to the contractor. They have this right, not for the reason that the employer's property has been benefited by the labor or materials furnished by the employés, but because they have furnished the labor or materials for the contractor, to whom the law has granted a lien, for the amount which became due to him under the contract, in consequence of their labor and materials. It therefore necessarily follows that the employés cannot acquire a lien upon the house independent of the original contract, and that they are not entitled to a lien as principals, though entitled to be first paid out of the moneys becoming due under the contract, and which have been earned by the application of their labor or materials.

Are the employés of the sub-contractor subject to all the conditions that may be created by the account between the contractor and sub-contractor? If the account is consistent with the terms of the contract entered into between the contractor and the sub-contractor, and payment has not been prematurely made, there can be no doubt that the employés of the sub-contractor are not entitled to demand from the contractor or employer an amount exceeding the sum then due the sub-contractor, according to his agreement with the contractor. (See *Bowen v. Aubrey*, 22 Cal. 566, and cases cited.) The contrary doctrine cannot be true, unless it can be demon-

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strated that a party who has fully complied with the terms of his agreement can be held responsible for an amount exceeding the amount he agreed to pay.

The mere fact that a portion of the work was done, and the materials furnished by the employés of the sub-contractor, could not entitle him to receive, either directly, or indirectly through payments to his employés a greater sum than he would have been entitled to had he personally performed all the labor and furnished the materials, in performance of the sub-contract. The action seems to have been brought in view of that principle, for it is alleged in the complaint that an amount exceeding the plaintiff's demand was then due the sub-contractors, on their contract with the original contractor, who is entitled to all the residue of the original contract price, that he has not agreed to pay to the sub-contractors, and the contractor is not made a party to the suit. Under the principle now contended for by the appellants, if the sub-contractors had purchased of the material man, on credit, a bill of lumber, to be used by them in performance of their contract, and had thereupon abandoned the contract and appropriated the lumber to other purposes, the original employer would be held liable for the price of the lumber, and he, upon settlement with the contractor, would be permitted to deduct that sum from the contract price, although the contractor, in performance of the contract, had been obliged at his own expense to furnish the full amount of lumber required for the building. The statute, for the protection of employés, holds the payment made before it fell due, according to the terms of the contract, void as against the unsatisfied claims of the employés; but if payment has been made according to the terms of the contract, and before the material man or laborer has given notice of his claim according to law, we find no provision in the statute holding the employer or the original contractor liable for the payment of such claim, and certainly there is no rule of the common law leading to such a result. If in such case the contractor is not indebted to the sub-contractor he is not responsible for the labor or material furnished to the sub-

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contractor by his employés; and the employés not being entitled to intercept it as a portion of the amount due or becoming due to the contractor, cannot have a lien upon the house for their payment. Their only remedy in such case is against the sub-contractor; and if they are not willing to trust to his personal responsibility, they must see that his contract is adequate, as to the price and terms, to afford them sufficient security.

Judgment affirmed.

Mr. Justice SHAFER, having been of counsel, did not sit in this case.

ROBERT J. VANDEWATER v. P. A. McRAE, JOHN C. FALL, WM. P. DENCKLA, AND M. FULLER.

JUDGMENT ON NOTE AND MORTGAGE NOT A BAR TO ACTION AGAINST INDORSER.

— A judgment against the maker of a promissory note secured by a mortgage executed by him simultaneously with the note for the amount due on the note, and directing a sale of the mortgaged premises and an application of the proceeds on the judgment, costs, etc., is not a bar to an action against the indorser of the note, who indorsed the same at the time of its execution for the accommodation of the maker.

APPEAL from the District Court, Twelfth Judicial District, City and County of San Francisco.

The cause was, by the agreement of the parties, referred to Alexander Campbell, as sole referee, to try the case and report a judgment. The referee reported a judgment in favor of the defendants. This report was, on motion of the plaintiff, set aside and a new trial granted, and the present appeal is from that order.

The other facts are stated in the opinion of the Court.

Hoge & Wilson, for Appellants.

The case entirely turned upon the finding and opinion of the referee, that this action against the defendants as indorsers of

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the note in question, was barred by the proceedings and judgment in the foreclosure suit, set out in the report of the referee.

By the amendment to the two hundred and forty-sixth section of the Practice Act, adopted in 1861, it was provided that there should be *but one action for the recovery of any debt, or the enforcement of any right secured by mortgage, or lien upon real estate, etc., which action shall be in accordance with the provisions of this chapter.* And in that action the Court was empowered by its decree or judgment to direct a sale and application of the proceeds to the payment of the amount due, and if there should be any deficiency, the judgment should then be docketed for the balance against the *defendant or defendants personally* liable for the debt, and an execution, as in other cases.

It would seem that the force and intent of these provisions are perfectly manifest. No argument can make them plainer. The law is positive and admits of no evasion. There shall be but a single proceeding for the recovery of a debt when it is secured by mortgage upon real estate, etc., and that shall be against all parties liable for that debt, and shall administer a perfect remedy as between the parties. There is no necessity for and no right to any other proceeding for the recovery of that debt, or the enforcement of that right, and thus the door is closed against useless litigation and multiplication of costs.

The plaintiff seemed to understand the law as we understand it, for he commenced his original proceedings against all parties in conformity with the requirements of the two hundred and forty-sixth section. He voluntarily dismisses his suit, as against these defendants, and proceeds against the others, and obtains his decree and judgment, and by so doing he lost his right to proceed against the defendants as indorsers, and must look to his decree and the mortgaged property for his satisfaction. If the holder of a debt, secured by mortgage, may do this, in defiance of the express provisions of the law, he may sacrifice the mortgage premises, by proceedings without notice to the other parties, to foreclose his mortgage by a separate proceeding, and buy in the property, at some nomi-

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nal sum far below its value, and still enforce his claims to the full amount against all others liable to him, or may drive them to expensive litigation, to get the benefit of the securities. This is directly violative of the whole policy of the law. At all events, before he should be permitted to pursue such course, he should at least be compelled to realize the benefit of his foreclosure proceedings, before he should be permitted to maintain a separate suit against the defendants upon their liability upon his note. As this Court said in the case of *McGarvey v. Hall*, 23 Cal. 141, the defendants have a clear right to set up the mortgage as a defense, and a right to have the mortgaged premises applied in satisfaction of the debt.

Delos Lake, for Respondent.

The obvious intent and object of this statute was to avoid and prevent a multiplicity of actions against the debtor. It was made for the benefit of the mortgagor alone.

In the absence of statutory regulations a mortgage creditor had it in his power to harass his debtor with three actions at one and the same time, *i. e.*, an action at law to recover the debt, an action in equity to foreclose the mortgage, and an action of ejectment.

Ejectment to recover possession under a mortgage was prohibited by section two hundred and sixty of the Practice Act. But until the amendment to section two hundred and forty-six, passed in 1860, the mortgage creditor could maintain separate actions to recover his debt and to foreclose his mortgage.

(The additional amendment of 1861 was to correct a mere verbal inaccuracy.)

By this section the creditor is restricted to one action, as against his debtor, who has secured his debt or obligation by mortgage—the mode of proceeding being minutely pointed out by the statute.

The whole scope of the statute is that a promissor who has secured the performance of his promise by mortgage, shall be

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subjected to but one action, which shall include his promise and his security. The term "debt" or "right" in the statute obviously has reference to the obligation which the mortgage is intended to secure.

The maker of the promissory note in question executed the mortgage to secure the performance of *its* promise or obligation, not to secure the performance of the obligation of the indorsers, and as against the mortgagor there can be but one action.

The obligation of an indorser is wholly different from that of the maker. He is not jointly liable with the maker, and but for section fifteen of the Practice Act, could not be joined in the same action. His agreement is, that in case the maker does not perform his promise, he, the indorser, will pay the sum which the maker has promised to pay.

The action against the indorser is not on the maker's promise, but on the indorser's promise.

By the Court, SHAFTER, J.

The defendants are charged by the complaint as indorsers of a promissory note. The following facts are set forth in the agreed statement on motion for new trial:

"On the fifteenth day of December, 1858, the plaintiff loaned to the French Town Canal and Mining Company, the sum of fifteen thousand dollars, for which sum the said company made their promissory note payable to the order of the above named defendants, who indorsed the same for the accommodation of the said makers, the French Town Canal and Mining Company; and, after such indorsement, said note, so indorsed, was delivered to the plaintiff.

"That at the maturity of said note, the same was duly presented to said makers, for payment, at the office of R. E. Brewster & Co. in the City of San Francisco (being the place named in said promissory note,) and payment thereof demanded and refused, and that the above named defendants were duly notified of such demand and non-payment. That there was

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due on said promissory note, and unpaid, the sum of fifteen thousand four hundred and seventy-five dollars and ninety-one cents, after deducting all payments, and that the plaintiff is the owner and holder of said note.

"That simultaneously with the making, indorsing and delivery of said promissory note, the said makers, the French Town Canal and Mining Company, made, executed and delivered to the plaintiff a mortgage, conditioned for the payment of said sum of fifteen thousand dollars and interest, so loaned, as above set forth, to said company, according to the terms of said promissory note, and as security therefor; by which said mortgage said company mortgaged to the plaintiff certain real estate and premises in the County of Butte, known as the French Town Canal and Mining Company Water Ditch.

"That on the 13th day of January, 1862, said plaintiff instituted suit in the District Court of the Fourth Judicial District of the State of California, in and for the City and County of San Francisco, wherein the said French Town Canal and Mining Company, and the defendants in this suit, and others, were defendants, to foreclose said mortgage and sell said mortgaged premises to satisfy said note and for judgment and payment against the said French Town Canal and Mining Company, and the defendants in this suit, for the amount which might be found to be due to the plaintiff for principal and interest upon the said note and mortgage, after applying the proceeds of sale of the mortgaged premises toward the payment of the same, and the costs of the said action.

"That on the first day of September, 1862, said last named Court made an order sending said cause to the County of Butte, in the then Fifteenth Judicial District of this State, for trial in the said County of Butte, on the fourth day of November, 1862; and at the trial of said cause said action was, on motion of counsel for plaintiff, dismissed as to the said defendants herein, and brought on for trial against said French Town Canal and Mining Company and others; and judgment was rendered in said cause that there was due to plaintiff therein,

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on said note secured by said mortgage, on the 4th of November, 1862, the sum of ten thousand seven hundred and fifty-five dollars and fifty-four cents, with interest at the rate of two and a half per cent per month; that said mortgaged premises be sold, and in case of deficiency in the proceeds of such sale to satisfy said debt, interest and costs and expenses, on the coming in and confirmation of the Sheriff's report of such sale, that the said French Town Canal and Mining Company should pay to plaintiff such deficiency, with interest aforesaid; and that said judgment remains in full force, unreversed and not appealed from."

It is insisted on behalf of the appellants that this action cannot be maintained against them in view of the two hundred and forty-sixth section of the Practice Act as amended in 1860, and in 1861. The section is as follows:

"There shall be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage or lien upon real estate or personal property; which action shall be in accordance with the provisions of this chapter. In such action, the Court shall have power by its decree or judgment, to direct a sale of the encumbered property (or of such part thereof as shall be necessary) and the application of the proceeds of the sale to the payment of the costs and expenses of sale, the costs of suit, and the amount due to the plaintiff. If it shall appear from the Sheriff's return that there is a deficiency of such proceeds, and a balance still due to the plaintiff, the judgment shall then be docketed for such balance against the defendant or defendants personally liable for the debt, and shall from the time of such docketing be a lien upon the real estate of the judgment debtor, and an execution may thereupon be issued by the Clerk of the Court, in like manner and form as upon other judgments, to collect such balance or deficiency from the property of the judgment debtor."

There are but two views possible, as to the meaning of this section — first, that the inhibition contained in it, is limited to the case where the mortgage given is collateral to the particular right which the action is brought to enforce; or, second,

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that the inhibition not only extends to cases of that class, but comprehends cases also where the mortgage is not collateral to that right. The question has been argued, to some extent, on considerations of convenience; but the intention is to be sought for primarily in the language of the section quoted, subject to the settled rules of interpretation and construction.

There may be a question, as suggested by respondent's counsel, as to whether the liability of an indorser sounds in "debt," in the common law sense of that term. But it is unnecessary to determine the point, for the word "right" is used in the same connection as the "debt;" and whatever material element there may be, not included within the latter term, would of course be comprehended by the former. If an indorser does not owe a "debt" to his indorsee technically considered, there can be no doubt that the indorsee has, as against the indorser, all the "rights" of a promisee. For all the purposes of discussion, then, the words "for the recovery of any debt" may be eliminated, leaving the section to read as follows: "There shall be but one action for the enforcement of any right secured by mortgage," etc. The right referred to, is obviously, not the right of a mortgagee as such, but a right existing independently of the mortgage, and which the mortgage is given to secure—a right, in short, the correlative of which is a liability *in personam*; and it results, that the provision may be paraphrased as follows: "There shall be but one action for the enforcement of a personal liability secured by mortgage," etc. The words "secured by mortgage" are descriptive of the right or personal liability, contemplated by the section, and any personal liability not so secured is manifestly without its purview. This action is brought for the enforcement of a personal liability, and if that liability is not secured by mortgage, then the action can be maintained.

On what may be called the question of fact involved in this proposition, it would seem that opinions could not be divided. The mortgage given in this case, was executed by the makers of the note, and the only personal liability secured by it, or

Statement of Facts.

intended to be secured by it, was that of the makers of the note — as such; or to use the language of the section, the only “right,” secured by the mortgage, was the right of the plaintiff, as indorsee of the note, to call upon the makers to fulfil their personal promise. The promise of a maker of a note is one thing, and the promise of an indorser is another. One is primary and the other is secondary; one is absolute, the other turns upon conditions; each may be secured by a separate mortgage, or one mortgage may be so framed as to secure them both. But a mortgage which by its terms is made applicable to the promise of the maker only, can in no just sense be regarded as collateral either to the personal liability or to the “right” of which the contract of indorsement is the source. On the ground, then, that the right which this action is brought to enforce is unsecured by mortgage, we consider that the plaintiff is at liberty to pursue the defendants *in personam* on their contract of indorsement.

The order granting a new trial is affirmed.

P. CUNNINGHAM v. T. H. HAWKINS.

PROOF THAT DEED WAS INTENDED AS MORTGAGE.—Parol testimony is admissible to show that a deed, absolute on its face, was intended by the parties to be a mortgage, and this rule applies to cases in law as well as in equity.

EVIDENCE IN EJECTMENT.—In actions to recover real property, testimony is admissible to show that a deed, absolute on its face, was intended as a mortgage.

APPEAL from the District Court, Tenth Judicial District, Sierra County.

This was an action to recover possession of one undivided fourth part of a mining claim situated at Poverty Hill, Sierra County.

The complaint averred that on the first day of September, 1861, the plaintiff was the owner of and in possession of the interest in the claim in dispute, and that on the same day defendant entered and ousted him from the possession thereof.

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Plaintiff, on the trial, proved that on and before the 16th day of February, 1856, one James Cunningham was the owner of and in possession of the interest in dispute, and that on the same day he sold and delivered possession thereof to one James H. Bartlett.

Plaintiff then introduced in evidence the following bill of sale:

“POVERTY HILL, May 13th, 1856.

“*Know all men by these presents*, that I do, for and in consideration of the sum of two hundred and two dollars 65-100, with interest from date till paid by me, transfer all my right, title, and interest in the claims known as Bartlett, Craig & Co.’s, on Poverty Hill, to Geo. Raskt & Co. Said interest consists of one fourth part of six claims.

“JAMES H. BARTLETT.

“JAMES CUNNINGHAM,

“GEORGE WEST.”

Plaintiff then proved that the land described in plaintiff’s complaint was, at the time said conveyance was made, known and designated as Bartlett, Craig & Co.’s Claims, and that the interest described in said conveyance was the same interest in said land that this action is brought to recover. That the firm of Geo. Raskt & Co. named in said conveyance, was composed of Geo. Raskt and the defendant, T. H. Hawkins.

Plaintiff then gave in evidence a note from James H. Bartlett to Raskt & Co., of which the following is a copy:

“POVERTY HILL, Sierra County, Cal., May 13th, 1856.

“On demand, for value received, I promise to pay to Geo. Raskt & Co. the sum of two hundred and two dollars 65-100, with interest at the rate of three (3) per cent a month till paid.

“\$202 65-100.

JAMES H. BARTLETT.

“Witness: GEO. WEST.”

Plaintiff then offered to prove by the testimony of the said James H. Bartlett that the conveyance was intended as a mort-

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gage to secure the payment of the note, and not as an absolute conveyance.

Plaintiff then introduced in evidence a deed from said Bartlett to him of the property in dispute, dated August 1st, 1861, and proved that a few days after the execution of the same he exhibited the same to defendant, and offered to pay him any demand he might have against said Bartlett which was a lien on the premises.

Defendant recovered judgment in the Court below, and plaintiff appealed.

The other facts are stated in the opinion of the Court.

Williams & Johnson, for Appellant.

It is now the settled rule in this State, and has been since the question was first before Mr. Justice Field, that parol evidence is admissible in equitable actions to show for what purpose a written instrument was given, when that evidence is pertinent to the issues made. We are unable to see a reason for a different rule in actions at law. Possession and the Statute of Limitations were made issues by defendant in this case, and we had a right to bring ourselves within the statute, and to show our possession by showing that Hawkins held as mortgagee. If in doing this it becomes necessary to prove for what purpose a writing was given, we have unquestionably the right to make the proof. True, the written instrument best proves its contents; nor do we seek to change or disturb the wording of the instrument, or its meaning—but we asked to show for what purpose it was given.

Creed Haymond, for Respondent.

By the Court, SAWYER, J.

Plaintiff introduced in evidence an instrument in writing executed by James H. Bartlett, dated May 13, 1856, purporting to transfer to George Raskt & Co. "all my (his) right, title and interest in the claims" in dispute, "in consideration of

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the sum of two hundred and two dollars and sixty-five cents, with interest from date till paid by me." Also, a note given by said Bartlett to said Raskt & Co., bearing the same date, for the sum of two hundred and two dollars and sixty-five cents, payable on demand with interest until paid, at three per cent per month. He then offered to prove by Bartlett, that, the said instrument transferring said claims was intended by the parties to be a mortgage to secure the payment of said note. Upon objection of defendant the testimony was excluded by the Court, and exception taken to the ruling by plaintiff. The ground of the objection, is, that the evidence is irrelevant, and that it is inadmissible to show by parol that the instrument was intended as a mortgage. The testimony is relevant; and it is now settled in this State that parol evidence is admissible to show that a deed absolute on its face was intended to be a mortgage. (*Pierce v. Robinson*, 13 Cal. 116; *Johnson v. Sherman*, 15 Cal. 291.) Nor can the rule be confined to cases that formerly were cognizable in equity alone. There is but one form of action in this State, and the same rules of evidence must be applied alike to all cases. It may be that formerly the rule prevailed only in cases in equity. But, however that may be, there is no distinction in this State.

Section two hundred and sixty of the Practice Act provides, that, "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale." If the rule contended for by the respondent prevailed, this provision of the statute would be nugatory, for the reason that when the mortgage is in its terms an absolute conveyance, the mortgagor would be prohibited from showing the real character of the transaction. The position contended for by the respondent would resolve the question into one of pleading, rather than a question as to the competency of evidence. But there is no equitable title to be set up. The plaintiff, if he has any title at all, has a legal title. A mortgage under our system, as between the parties, does not pass the legal title to the grantee. The title

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remains in the mortgagor until it is divested by a foreclosure and sale, whatever the terms of the mortgage may be.

There was error in excluding the testimony, and as we cannot know but that the Court might have come to a different conclusion and decision, had the testimony been admitted, there must be a new trial.

The order denying a new trial is reversed, and a new trial ordered.

JOHN ANDERSON v. J. G. DOLL.

INTERLINEATION IN WRITTEN CONTRACT.—If the owner of a horse delivers him to another party in pledge to secure the payment of a debt, and the parties contract in writing that the pledgee may keep the horse one year, paying for his use a stipulated sum, and may further keep him a second year upon the same terms, by giving proper notice of his election to do so, and the copy of the contract kept by the pledgee is interlined the next day by consent of parties so as to allow the pledgee to keep the horse two years more, instead of one, and the owner afterwards sells the horse and contract to a third party, and the pledgee gives notice of his election to keep the horse one year more, and at the end of that time accepts from the purchaser the money due from the pledgee, these circumstances are evidence that the pledgee regarded the original contract as binding.

LICENSE TO DO BUSINESS NOT A TAX.—A license paid to keep a stallion is not a tax upon his assessed value.

APPEAL from the District Court, Second Judicial District, Tehama County.

Plaintiff recovered judgment in the Court below, and defendant appealed.

The other facts are stated in the opinion of the Court.

George Cadwalader, for Appellant.

The findings of the Court below show that the contract was executed in duplicate the day it bears date, and that on the subsequent day the alterations were made in the presence of Welsh, and with his consent, and for the express purpose of extending the time to three years.

Courts, in the construction of written contracts, always

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endeavor to give effect to the intention of parties, provided they can do so without violating any rule of law.

"A material alteration in a note or bill, made by the consent of all parties, is valid and binding. * * * Consent may be subsequent, as well as prior to the alteration, since the parties must be as competent to alter their contract after it was made as originally to make it."

The law of the alteration of other instruments is the same as that of negotiable paper. (2 Parsons, 581.)

While it might be true that Welsh, the vendor of Anderson, would be responsible to him for selling and assigning a paper that was not what it purported to be, it is extremely difficult to see what Doll had to do with the transaction, or how Doll is estopped from claiming his just rights under his contract by any transaction that might have occurred between Anderson and Welsh. It is not pretended that Doll was asked by what terms he held the horse, and that he made false representations on which Anderson acted to his injury. Nor is it possible to bring plaintiff's case within any definition of an estoppel. (*Boggs v. Merced Mining Co.*, 14 Cal. 279; *Davis v. Davis*, 26 Cal. 23.)

Townsend & Combs, for Respondent.

By the terms of the contract only the "taxes upon the horse" were to be refunded by Welsh, not the taxes upon the use of the horse in a particular manner, to wit: for *public hire*.

The Court finds that "before the commencement of the standing season of 1863, defendant, in accordance with the contract, gave notice that he elected to keep the horse *during that season*." This furnishes the strongest inference from the defendant's own act that he *knew* that his right of election was only for *one* year after the first, and not for *two*, as he afterwards set up in his answer.

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By the Court, CURREY, J.

This is an action of replevin for a thoroughbred stallion called "Rifleman," valued in the complaint at six thousand dollars. It appears from the record that on the 18th of February, 1862, one Welsh, then the owner of the horse Rifleman, borrowed of the defendant one thousand dollars, for which he gave him his promissory note, bearing interest at the rate of one and one half per cent per month. To secure the payment of the sum so borrowed, Welsh delivered the horse in pledge to the defendant. The defendant, wishing to use the horse, agreed to pay Welsh one thousand dollars for the use of the horse one year, and it was further agreed between the contracting parties that the defendant should have the privilege of keeping the horse another year, upon the same terms, upon giving proper notice of his election to do so; in which event the note mentioned was not to become due until the lapse of the extended term. The defendant was to pay the expenses of keeping the horse, and also the taxes upon his assessed value. The taxes so paid were to be refunded with interest by Welsh to the defendant at the expiration of the term.

On the sixth of September, 1862, Welsh sold the horse to the plaintiff, and at the same time assigned to him the contract entered into between himself and the defendant. Early in the year 1863 defendant gave notice, in accordance with the terms of the contract, of his election to keep the horse the second year. Immediately after the second year had expired the plaintiff demanded of the defendant the horse, and at the same time tendered him the amount due on the note due him from Welsh, and also the sum due for the taxes on the assessed value of the horse for State and county purposes for the years 1862 and 1863, and the interest thereon at the rate stipulated. The sums so tendered the defendant accepted, but refused to surrender the horse. The plaintiff then brought this action. In defense the defendant alleged that by the contract he was entitled to have and hold the horse for three years, and also that the county

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license tax for the years 1862 and 1863 for keeping the stallion for hire was not paid him.

The Court found that by the original contract the defendant had the right by his election to extend the term of holding the horse in his possession for one year in addition to the first year stipulated, so that by its terms the whole period would expire in the spring of 1864. It was also found that the copy of the contract offered in evidence by the defendant was interlined so as to give him the right to elect to keep the horse two years instead of one, additional to the first year; and that it was in evidence that the interlineation was made by the defendant in the presence of Welsh and with his consent on the day after the original contract was executed, but that there was no evidence that the plaintiff had notice of the change so made in the defendant's copy or counterpart of the contract as first executed.

If it were admitted that the change made by the interlineation referred to, could have operated to give the defendant the right to elect to keep the horse two years in addition to the first year, instead of one only, even as against the plaintiff who purchased the animal without notice of the change, still it does not appear that he made such election, but on the contrary it is found by the Court that the defendant did elect in terms to retain the possession and use of the horse for the second year only; besides which it is also found that the defendant accepted the money on the note for one thousand dollars, and also the taxes on the assessed value of the horse with the interest thereon as due. These several circumstances are to our minds strong evidence that the defendant regarded the original contract as the one of binding validity. If the original contract was not subsisting and binding at the time he gave notice of his election to keep the horse the second year, then he was not entitled to have and hold him under such notice.

The defendant further controverted the plaintiff's right to recover, on the ground that the county license tax for the years 1862 and 1863 were not paid him. This objection we think

Statement of Facts.

not well founded. The amount paid for a license to do a particular kind of business could not be charged to the owner of the horse under the terms of the contract to refund the amount paid for taxes on the horse.

We are satisfied the Court below came to a correct conclusion as to the rights of the parties upon the facts found, and that the judgment should be affirmed.

Judgment affirmed.

Neither Mr. Chief Justice SANDERSON nor Mr. Justice SAWYER expressed any opinion.

A. DELAND v. HARVEY H. HIETT.

DISCHARGE OF A JUDGMENT.—A payment of part of the amount due upon a money judgment under an agreement that it shall operate as satisfaction in full will not discharge the judgment.

VOID AGREEMENT.—An agreement to discharge a judgment for a sum less than the amount for which it was rendered is void.

APPEAL from the District Court, Tenth Judicial District, Yuba County.

The complaint averred that on the 22d day of April, 1861, W. S. Webb recovered a judgment against the plaintiff in the District Court of Yuba County, for four thousand three hundred and forty dollars, to bear interest at three per cent per month, and that J. O. Goodwin was the attorney of record for said Webb. That on the 18th day of October, 1861, W. S. Webb assigned the judgment to J. R. Webb. That on the 31st day of May, 1862, plaintiff paid said Goodwin one thousand dollars in full satisfaction of said judgment, and that said Goodwin, then and there acting on behalf of said Webbs, and at the request of said Webbs, and being authorized by them to do so, agreed to receive and did receive said money in full satisfaction and payment of the judgment, and with the knowledge and consent of said Webbs, acknowledged in writing

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upon the margin of the judgment roll, satisfaction of the judgment, in the words and figures as follows:

"For value received, the within and foregoing judgment is hereby satisfied in full. May 31, 1862.

"J. O. GOODWIN,

"Attorney of record and a fact for W. S. and Josiah R. Webb."

That on the 13th day of October, 1862, J. R. Webb assigned the judgment to defendant Hiett, and that he received the assignment with full knowledge of the facts, and that he was threatening to compel payment of the judgment by execution and forced sale of plaintiff's property.

The complaint prayed that the judgment be decreed satisfied, and that the defendant be enjoined from proceeding to enforce the collection thereof by execution or otherwise.

The answer denied that defendant, when he received the assignment, knew that the judgment was paid in whole or in part, or that he knew satisfaction of the same had been entered of record, and admitted the other allegations of the complaint.

The case was submitted on the pleadings.

The Court adjudged that the judgment be credited with one thousand dollars, but denied the injunction.

Plaintiff appealed.

H. K. Mitchell, and *George Cadwalader*, for Appellant, cited as to satisfaction and receiving part in payment of the whole; 2 Parsons on Contracts, 129, and note; 5 Oranch, 11; 5 Johnson, 390.

N. E. Whitesides, for Respondent.

By the Court, SHAFER, J.

The question in this case, is, whether a payment of a part of the amount due upon a money judgment will discharge the judgment, the payment having been made under a dry agree-

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ment that it should operate as a satisfaction in full. It was held in *Cumber v. Wane*, 1 Strange, 426, the leading case upon the subject, that a liquidated indebtedness, presently due, could not be discharged by a payment of less than the whole sum; and in the case of *Fitch v. Sutton*, 5 East, 230, the doctrine is not only reasserted, but the reason of it is given—such a contract is *nudum pactum*. The question has been adjudged, probably in every State in the Union, and the rule has been uniformly affirmed, and on the ground stated. There is a diversity of cases that are sometimes spoken of as exceptions to the rule, but they are, more properly, not within its scope. A composition, going solely upon the grounds stated, is universally bad. Inasmuch as the discharge in this case was of record, it is possible that it might operate as an estoppel, were it not for the fact that the complaint itself goes behind the record and exposes the fact that the discharge was entered in pursuance of a *nudum pactum*. The cases bearing upon the main question are collected in 1 Smith's Leading Cases, page 147, where the present state of the law upon the point is fully and learnedly exhibited in the note on *Cumber v. Wane*.

The judgment is affirmed.

PATRICK CREIGHTON v. JOHN S. MANSON.

STREET IMPROVEMENTS BY A MUNICIPAL GOVERNMENT.—The municipal government of a city, in causing street improvements to be made, acts under the authority conferred upon it by the Legislature, and is subject to all the constitutional limitations and restraints imposed on the Legislature, and has no other or greater power than is and lawfully may be conferred on it by the legislative act.

ASSESSMENT NOT A TAX.—An assessment levied by a municipal Government upon lots adjacent to a street to pay for improvements made on the street, if held to be a tax, cannot be maintained, because it lacks the constitutional requirement of equality and uniformity.

STREET IMPROVEMENTS IN A CITY.—The Legislature has not the power to charge the persons who reside on a street in a city with the expenses of an improvement on that street.

CONSOLIDATION ACT AS TO STREET IMPROVEMENTS.—The Legislature has not, by the Consolidation Act for the government of San Francisco, and the amendments thereto prior to 1862, done anything more than to provide for a lien upon lots adjacent to a street for improvements made on the street,

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and define the manner in which the same may be enforced. These Acts do not create any personal liability on the part of the owners of such lots for such improvements, nor does the amendment of 1862 create any personal liability for work done or to be done under contracts entered into before its passage.

ASSESSMENT ON LOT FOR IMPROVEMENT OF STREET.—If, under the power to take private property for public uses upon making a just compensation therefor, the Legislature possesses the power to levy an assessment upon lots in a city adjacent to a street to pay for improvements made on the street, the assessment cannot exceed the value of the benefit conferred on the lot or its owner by the improvement, and can be enforced only by proceedings to subject the lot to a sale in discharge of the lien.

SAME.—Such assessment cannot be laid on the lot or its owner when the lot has received only an injury by the work on the street for which the assessment is levied.

STATUTE CREATING A LIEN ON A LOT FOR STREET ASSESSMENTS.—A statute creating a lien upon a lot in a city to secure the payment of an assessment levied on the lot for improvements in the street adjacent, must be strictly construed, and the proceedings authorized by the statute to create and enforce the lien must be followed precisely as directed, or the whole proceeding will be void.

RESOLUTION TO GRADE STREET IN SAN FRANCISCO.—A resolution of the Board of Supervisors of the City and County of San Francisco of intention to grade a street, must be presented to the President of the Board for his approval; and if not so presented, no lien can be enforced on the lots adjacent to the street for assessments for grading the same.

HOW MUNICIPAL LEGISLATURE CAN ACT.—The legislative department of a city government can act only through the medium of an ordinance, but the ordinance may be in the form of a resolution, or be preceded by the words "Be it ordained," etc.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The defendant appealed from the judgment.

The other facts are stated in the opinion of the Court.

Haight & Pierson, for Appellant.

We know of no precedent in legislation or in judicial decisions under a Constitution like ours for creating a personal liability against an owner for an improvement of this kind over and above the value of the lot. The usual remedy is to assess the expense of the work upon the property responsible for it, without loading the owner with a heavy penalty over and above the value of his lot.

The adjudications on questions arising heretofore under similar laws do not control the present case, because no similar one has ever been decided.

Argument for Appellant.

The facts of this case being radically different from those of any previous one, present a different question for determination.

A law making one responsible without his knowledge or assent for an expenditure which results in impairing or destroying the value of his property, should manifestly receive a strict construction, and a strict compliance should be exacted in favor of the latter. It is a question not of moral or equitable obligation, but of naked technical legal liability.

The cases in which this principle has been decided are collected in the second chapter of Blackwell on Tax Titles, page 43, and following. (See, also, *Sharp v. Spier*, 4 Hill, 76; *Sharp v. Johnson*, 4 Hill, 92.)

Most of the cases referred to in Blackwell are those of a sale of land for taxes, and the rules applicable to such sales are too familiar to need comment.

There is an obvious duty to pay taxes, but no such obvious duty to incur a heavy expense in making a highway for the use of the population, resident and transient, of a great city. The rule is a most salutary one in the case of general taxes, as universal experience demonstrates, and should not be relaxed, but rather made more stringent; much more in the case of a special and onerous exaction, no argument is needed to show that the most severe and stringent rule should be adopted and the most exact compliance required. In such statutes nothing is left to the discretion of the officer. None of the provisions are directory, which can be obeyed or not without affecting the validity of the proceeding. Every step required to be taken by the statute must be taken, or the defendant will not be liable.

Whether the proceeding is one that creates a liability for a definite sum of money, or deprives a man of a piece of land equal in value, does not change the principle. Whether a man is made liable for one thousand dollars, or loses a piece of property of the value of one thousand dollars, the effect and rule of construction in both cases are the same.

Some have argued that a statute which authorizes taking

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from a man a sum of money without his consent, is not to be construed so strictly as one which takes from him a parcel of land of equal value. The bare statement of the proposition refutes it sufficiently.

The fact that in the case of a pecuniary liability a suit has to be brought is of no importance, if the defendant is not at liberty to require on the part of the plaintiff a strict compliance with the law. Of what advantage in such a case is the privilege of a defense, if the defendant cannot avail himself of omissions and failures to comply? The defendant cannot go outside of the statute to show equities in his defense. No matter how inequitable the plaintiff's claim may be, if the law has been pursued, there is no remedy. The plaintiff has simply to say, "*ita lex scripta est.*" He cannot complain, therefore, of being tried by the same rule which he invokes.

The first objection is that no legal or official action was taken by the Board of Supervisors to cause notice of their intention to be given. Section sixty-eight of the Consolidation Bill, (Stats. of 1856, p. 164,) provides that "every ordinance or resolution of the Board of Supervisors, providing for any specific improvement, and for laying a tax or assessment, shall, after its introduction, be published five days;" and "every such ordinance, after the same shall pass the Board, shall, before it takes effect, be presented to the President for approval. If he approve he shall sign it; if not he shall return it," etc. "If at any stated meeting thereafter, two thirds of all the members elected to the Board vote for such ordinance or resolution, it shall, despite the objections of the President, become valid."

Section forty provides that whenever the Board shall determine to grade any street, they shall cause notice of their intention to be published for the period of ten days, etc.

The resolution of intention is the foundation of the whole proceeding—the first step upon which the others rest. It provides for a *specific improvement*, and for laying an assessment; it must be presented to the President for his approval; without his approval it is no more the official act of the Board

Argument for Respondent.

of Supervisors than if it had been signed by a majority of the members not convened in session as a Board. Without the signature of the President it lacks the very element required by the statute.

Daniel Rogers, for Respondent.

Appellant's counsel contend that the assessment is void and unconstitutional, inasmuch as it conflicts with that part of section eight of Article I of the Constitution, which declares "nor shall private property be taken for public use without just compensation." It is also contended that the appellant cannot be made to pay an amount over the assessed value of the property. These positions are untenable. The Superintendent, in the execution of the contract, is the agent of the owner as well as the city. The principle involved is the same as laying a tax; upon failure to pay in either case, the property is liable to sale. The tax is for the benefit of the public, and yet it cannot be urged that upon a sale for taxes property is taken for public use without compensation. The improvement for which this suit is brought, is, to some extent, of general benefit—yet more chiefly for the benefit of the immediate neighborhood. The benefit is immediately to adjacent property holders, and only indirectly to the city. (*Argenti v. City of San Francisco*, 16 Cal. 283.)

This Court has already decided that assessments for street repairs are constitutional, without respect to the amount assessed being disproportionate to the assessed value of the property. (*Hart v. Gaven*, 12 Cal. 477.)

C. H. Parker, also for Respondent.

The first objection is based upon the assumption that the *notice of intention* falls within the provisions of section sixty-eight. This is a mistake. The *modus operandi* is this: The Superintendent, whose duty it is to see what street work ought to be done, recommends to the Board that a street should be graded. At the next meeting, the Board, acting

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upon this information, passes a resolution stating that it is their *intention to order* (or *provide* for) said grading. This *notice of an intention* is a *feeler* thrown out by the Board to ascertain the wishes of the parties interested, and to enable them to protest, if they choose, against "*providing*" for this "*specific improvement*." Now, an *intention to provide*, is not *actually providing*, any more than the announcement of an *intention to go to Sacramento* necessarily involved the *actual going to Sacramento*. The Board may never proceed any further in the matter; if so, it cannot be said that they have *actually provided* for said specific improvement. It is one of a series of resolutions — a notice — but it is not *the* resolution of the series "*providing* for any specific improvement." After ten days publication, there being no objection to the grading of the street — all things being ready — the Board pass a resolution "*providing*" for the grading. This is the important resolution: and for this the old law required the formalities of section sixty-eight to make it effective. (The law of 1862 has dispensed with all this formality, so far as street improvements are concerned.)

It was never understood that the resolution of intention was within section sixty-eight, and it was seriously doubted whether the second resolution was within it. (9 Paige, Ch. R. p. 24.) Section sixty-eight was intended to cover only those resolutions which were not preceded by a *prior resolution of intention*.

By the Court, RHODES, J.

This action is brought to recover of the defendant the amount of the assessment levied upon a lot in San Francisco, by the Superintendent of Public Streets and Highways, to pay the plaintiff, as the contractor, for his services in grading Union street; also to enforce the assessment as a lien upon the lot.

The defendant was the owner of the lot when the services were performed, and still remains the owner. Previous to the making of the contract for the grading of the street between

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the Superintendent and the contractor, the lot was appraised, for revenue purposes, at fourteen hundred dollars. The assessment amounts to nineteen hundred and eighty-nine dollars and fifty-four cents. The lot is rendered worthless in consequence of the grading of the street. The Court gave judgment against the defendant for the amount of the assessment, and decreed that the plaintiff should have a lien on said lot to the amount of said judgment.

The construction and improvement of streets are public works, and are intended for the benefit of the public at large; and though the presumption may be indulged in that the larger portion of the benefit inures to the owner of the contiguous property, yet it is but a presumption which in a large proportion of cases is not true, and it remains but a presumption that is liable to be rebutted by proof of the truth. The streets, although public works and designed for public use, are not always constructed at public expense, but more generally they are graded and improved under the direction of the municipal authorities, at the expense of the contiguous lots and lands. The municipal governments, in causing street improvements to be made, act under the authority conferred upon them by the Legislature, the authority being a portion of the sovereignty delegated to them for the purposes of municipal government.

The municipal government, in the exercise of the authority thus conferred, is subject to all the constitutional restraints and limitations imposed on the Legislature, and has no other or greater power than is and lawfully may be conferred on it by the legislative act. It can make no order for the improvement of a street, and make no provision for the payment of the expenses, that the Legislature might not do if it should act directly in the matter. When the improvement has been made, an assessment is levied upon the adjacent real estate by the city government, in such manner as the Legislature has directed, to pay for the expenses of the work. Is the right to levy the assessment thus conferred upon the city a portion of the power possessed by the Legislature of

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raising money for public purposes by taxation, or does it rather fall within the right of eminent domain? If not derived from one of these, it is difficult if not impossible to refer it to any source of legislative power under the Constitution. It appears to us very clearly that the assessment is not a tax, and though the authorities are not uniform on this point, we think the opinion of Mr. Chief Justice Bronson in *Sharp v. Spier*, 4 Hill, 76, and in *Sharp v. Johnson*, Id. 92, unanswerable and decisive against its being regarded as a tax. (See also the able opinion in *People ex rel. Post v. Mayor, etc., of Brooklyn*, 6 Barb. 209; and *Municipality No. 2 v. White*, 9 Louis. Ann. 446.) If held to be a tax, it would be in violation of the cardinal rule of the Constitution which requires taxation to be equal and uniform. The Legislature may lawfully divide the State into districts, as counties, townships, cities, etc., and may provide that the authorities of each district may raise money for local purposes by taxation, and the amount may vary in the several districts, but the tax must be equal and uniform upon the persons and property subject to taxation in each district. If the assessment for street improvements is a tax it would be no more competent for the city government to levy the entire amount of it upon the property contiguous to the street that had been improved than to levy upon the same property the whole amount of the expenses of any branch of the municipal Government.

It is also very difficult to uphold the power of levying the assessment on the adjacent property upon the theory that it is parcel of the right of eminent domain, transferred by the Legislature to the subordinate authority. When private property, whether lands or personal property, or the value of either of them, is taken for public use, just compensation must be made therefor. In order to overcome this apparently unsurmountable difficulty, it has been often held that the owner of the property should be deemed to be compensated by the benefits in the way of an increase of value that the property has received by the adjacent improvements. We do not under-

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take to say whether such benefits, as fallacious as they are in many cases, and of which this case is a striking instance, do or do not constitute a "just compensation," according to the requirements of the Constitution; but for the purposes of this case, we admit that such benefits may satisfy the constitutional demand. The cases sustaining this view, generally, but not uniformly, hold that this benefit resulting from the street improvements attaches itself to the adjacent property, and does not directly accrue to the person who may happen to be the owner. The owner, as an individual disconnected from the property, receives no other or greater benefit from the making of the improvement than each person within the corporate limits. The doctrine that a limited number of persons, who may happen to own property in a given locality within the city, shall be chargeable personally with the expenses of a public improvement, is not in accordance with the presumption on which those cases proceed, and cannot be sustained upon any theory of the constitutional authority of the Legislature—neither as included in the taxing power nor the right of eminent domain, nor, indeed, upon any theory except that of the absolute power of the legislative department of the Government—for it would be merely the exercise of the power of taxation freed from the constitutional limitations of equality and uniformity, and would be as odious in all its features as a forced loan, without the justification of imperious necessity.

When expenses for the improvements have been incurred by the city, or some one acting under her authority, it has been usual to give a lien upon the adjacent property, or to authorize it to be sold for the payment of those expenses, or some part of them. This brings us to the inquiry whether, by the provisions of the San Francisco Consolidation Act, and the amendments thereto, the Legislature has in fact done anything more than to provide for a lien upon the adjacent property and define the manner in which the same may be enforced. Sections forty-two, forty-seven, and other sections of the Act of 1856, provide that the expenses of the several

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kinds of work shall be borne by the adjoining property and shall become a lien thereon; and the amendatory Act of 1859, which was in force when the contract in this case was let, in corresponding sections, makes similar provisions.

The Act of 1862, which was in force when the work under the contract was completed, in the eighth section prescribes in detail the property that shall be liable for the payment of the different kinds of improvements; and a subsequent section provides that upon the doing of certain official acts the amount assessed upon each parcel of property shall be and constitute a lien thereon. It is apparent from these provisions of the Consolidation Act, that it was intended that the expenses of each street improvement should be borne by the contiguous lots; and there is no clause in the Act of 1859, or of the Act of 1862, which, either directly or by necessary implication, charges the owner of the lot personally with those expenses that are required to be assessed upon the lot, unless that is done by those provisions of the Act prescribing the mode of procedure for the collection of the assessment. No cause of action accrued in any manner to the plaintiff as against the defendant, to recover the assessment until after the Act of 1862 took effect; for the work was not then completed, and the several official acts had not then been performed which were requisite before he could sue the defendant. The plaintiff, in his own right, acquired no cause of action against the defendant for the services performed, for there was no contract, express or implied, between the parties, but the right of action was transferred to him by a sort of legislative assignment, and when transferred to him he took it subject to the laws then in force, so far as his remedy against the defendant was concerned, though the contract with the Superintendent may have been made under a former Act.

It is provided in section twenty-nine of that Act that "All proceedings which may have been taken under the law, for which this law is a substitute, and which are pending at the time this law shall take effect, may be continued and completed

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under this law ;" and it is further provided by section thirteen that "In all suits now pending or hereafter to be brought to recover street assessments, the proceedings therein shall be governed and regulated by the provisions of this Act." Section thirteen of the Act of 1862, which is the only section of the Act authorizing the contractor to sue the lot holder to recover the assessment made as in this case, provides that the contractor after thirty-five days from the date of the warrant may sue "the owner of the land, lots or portion of lots assessed on the day of the date of the recording of the warrant, assessment and diagrams, or on any day thereafter during the continuance of the lien of said assessment, and recover the amount of said assessment remaining due and unpaid." The language and plain meaning of the section includes not only the person who owned the lot at the date of the recording of the warrant, assessment and diagrams as liable to be sued, but also each person successively who may thereafter and during the continuance of the lien be the owner. The statute does not provide a different remedy against the subsequent owner from that given against the owner at the time the lien attached, but it affords the same remedy in every case. The action is to be brought, not in the county in which the defendant resides, but in the county in which the lot is situated. The form of the judgment is also prescribed, the Court being empowered to "adjudge and decree a lien against the premises assessed and to order such premises to be sold on execution, as in other cases of sale of real estate by process of said Courts." The proceedings authorized to be taken in the case indicate that it was intended that the action should be an action *in rem* to enforce the payment of the assessment by a decree for the sale of the lot, and in proceedings of that character it was proper that the person owning the lot charged with the lien at the commencement of the action should be made a defendant to the action.

No one would contend that a subsequent purchaser of the lot was personally liable for the assessment, or that in enforcing the lien a personal judgment could be rendered against

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him. And it will be observed that no provision is made that judgment against the person owning the lot when the assessment was made may be taken in the action brought against the subsequent owner. It is beyond all doubt that the Legislature intended to charge the lot with the assessment, to give a lien upon the lot to secure the payment of the assessment, and to authorize the Courts to enforce the lien by ordering a sale of the property, but not to give any recourse against the owner or make him personally liable. If there was any doubt upon this point, we would be justified, and indeed required, to give the owner of the lot the benefit of the doubt, because, under the well established rules of construction, it is our duty to so interpret the Act, if its terms will admit of it, that it shall harmonize with the recognized rules of law and rights of property. It is not to be presumed, unless the terms of the Act imperatively require it, that the Legislature intended that under this Act such a wrong might be perpetrated as would result if the personal judgment against the defendant could be maintained for the recovery of the assessment, levied to pay for work performed not at his request, but against his objections, and when by the work, as performed, the value of his property was wholly destroyed.

It is proper to mention another principle, which we think is sufficient to control the whole case. If it is admitted that the benefits received by the property or its owner, by means of the improvements, will satisfy the constitutional requirement of a just compensation for the assessment levied upon the property, that theory is subject to the rule that the assessment must not exceed the value of the benefit conferred by the making of the improvement. This doctrine is laid down in *Matter of Fourth Avenue*, 3 Wend. 452; *Matter of Albany Street*, 11 Wend. 149; *Matter of Canal Street*, 11 Wend. 154; *Matter of William and Anthony Streets*, 19 Wend. 678; *Matter of Flatbush Avenue*, 1 Barb. 286; and is affirmed in *Canal Bank of Albany v. Mayor, etc., of Albany*, 19 Wend. 244; and *People ex rel. Post v. Mayor, etc., of Brooklyn*, 6 Barb. 209; and we think the doctrine is correct and applicable to cases

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like the one at bar. And certainly an assessment should not be laid either upon the property or the owner, where instead of a benefit to the property the owner has received only an injury by the work on account of which it is proposed to levy the assessment.

Judgment reversed and the cause remanded for further proceedings.

SAWYER, J., concurring specially.

I dissent from some of the views expressed in the opinion, but concur in the reversal of the judgment.

By the Court, RHODES, J., on petition for rehearing.

We have carefully considered the respondent's elaborate petition for a rehearing, but in the view we take of the case, a decision of several of the points therein made is unnecessary.

As suggested by the learned counsel, it may be far more convenient, in enforcing the payment of street assessments, to be permitted to take a personal judgment than a judgment *in rem* only, but that consideration would certainly not be seriously urged as a sufficient reason for allowing a judgment to be taken which was clearly in conflict with constitutional law.

If it is said that in the absence of a personal liability of the lot owner for the assessment, the contractor is liable to lose that portion of the assessment which exceeds the value of the lot presumed to be benefited by the improvement, for which the assessment was made, it may be answered that the same result might happen if the lot was the only property possessed by the lot owner; and further, that it is the duty of the contractor to see that some sufficient responsibility exists for the payment of his work; that is to say, to ascertain whether the lot is of value enough to bear the burden proposed to be imposed upon it for its improvement. It is as unquestionably his duty to see that ample liability exists for his payment as it is to know that a valid ordinance passed authorizing the work to be done, for he

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is dealing with officers vested with special and limited authority, and he must bear the consequence of his own errors and negligence.

We are earnestly pressed by the learned counsel for the respondent to grant a rehearing, because the case cannot be fully argued on briefs, as the law is special and complicated, presenting many points for discussion; but if our view of the situation and rights of the parties is correct, the points arising out of the details—the machinery—of the Act are immaterial to the decision of the leading question in the present action.

We are referred to section seventeen of the Act of 1862 as decisive of the question of the personal liability of the lot owner in favor of the contractor. It will be noticed that the contract was made under laws in force prior to the passage of the Act of 1862, and what we said in respect to the question whether a personal liability for the assessment was given by the statute, had relation, not to a case that might arise out of a contract executed under the Act of 1862, but to the case then before us growing out of a contract made under laws in force anterior to the passage of that Act. Although the Act of 1862 purports to create a personal liability, it does not in terms, nor by necessary implication, have a retrospective operation so as to create a personal liability for work performed or to be performed under contracts made before the passage of the Act. The Legislature, by the Act, granted to parties proceeding under the statute then in force the benefit of the remedies provided in that Act; but the grant of a new remedy—a mere mode of procedure to maintain an existing right—which is clearly within the power of the Legislature, is very different in substance and effect from the grant of a new or additional liability for services performed or being performed under an existing contract. We do not now, nor have we in the opinion already delivered, attempted to controvert the position of the respondent—that the Legislature have in express terms, in the seventeenth section of the Act of 1862, declared that the lot owner shall be personally liable for the payment of the assessment, but we hold that such liability can attach, if at all, only

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to contracts made after the passage of the Act, and when we said that the Legislature did not intend that the lot owner should be personally liable, we had reference to an assessment for work done under a contract made before, not after, the passage of that Act.

The principles upon which we rely for a solution of the principal questions in this case, and the course of reasoning adopted, may tend to show the invalidity of the personal liability clause in section seventeen of the Act of 1862, but the question of the validity of that clause is not in issue, because it has no application to the present case.

An assessment for the improvement of a street, levied solely upon the owners of the lots lying adjacent to the street that has been improved as a public street, and which is authorized by law to be collected from the lot owners as a personal charge, without regard to the benefit actually accruing to them by means of the improvement, is a tax, and as such is obnoxious to the objection that it violates the constitutional requirement of equality and uniformity.

We rest our opinion mainly on the proposition that street assessments, of the form of the present one, can be maintained, if at all, only on the theory that the power to levy such assessments upon the lots adjacent to the street that has been improved under the direction of the city government is parcel of the right of eminent domain transferred by the Legislature to the city; and that to maintain them even on that theory, it must be assumed that the benefits that the lots have received from the improvements constitute a "just compensation" for the lien cast upon them. The requirement of a just compensation to be made for private property taken for public use attends every exercise of the power by an authority subordinate to the sovereign power of the State, as well as by the State itself, and applies as well where the value or a part of the value of the property is taken by being subjected to the payment of a sum of money, as where the property itself, or some interest therein, is directly taken for public use. As a necessary consequence of this doctrine, the amount of the

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charge or lien imposed upon the property cannot exceed the value of the property, and the payment of the amount can be enforced only by proceedings to subject the lot to sale in discharge of the lien. The personal judgment rendered against the appellant is therefore erroneous.

The validity of the lien thus asserted, and of the judgment ordering the lot to be sold, must be ascertained mainly by an examination of the acts and proceedings required by law to be done and had by the officers of the city and the contractor previous to the time at which the alleged right of action accrued to the contractor. We previously omitted to consider this branch of the case because, the parties admitting the lot to be of no value, we deemed it unnecessary to ascertain whether the proceedings requisite to charge the lot with the payment of the assessment had been taken according to law, but as the contractor is entitled to his judgment, without regard to the value of the lot, if the proceedings have been regular, it becomes necessary to pass also upon the judgment ordering the lot to be sold.

Upon this question the appellant maintains that when summary proceedings are authorized by statute, the effect of which is to divest or affect rights of property, the statute is to be strictly construed, and that the power conferred must be executed precisely as given, and that any departure vitiates the whole proceeding. This doctrine is well expressed in the axiomatic language of Mr. Justice Bronson in *Sharp v. Spier*, 4 Hill, 76: "Every statute authority in derogation of the common law to divest the title of one and transfer it to another must be strictly pursued or the title will not pass." We expressed our concurrence in this principle in *Curran v. Shattuck*, 24 Cal. 427, as applicable to proceedings to acquire the right of way for a public road, and proceedings as in this case to acquire a lien for the payment of a street assessment are within the reasons of the rule.

We shall notice but one of the objections made by the appellant to the proceedings, and that is, that the resolution of intention of the Board of Supervisors to grade the street in question,

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was not presented to the President of the Board for approval according to the requirements of section sixty-eight of the Consolidation Act. It is a general rule that the legislative department of a city government can act only through the medium of an ordinance, unless the organic law specially provides another mode. The instrument containing the expression of the legislative will need not necessarily be in the usual form of a municipal ordinance and be preceded by the words "Be it ordained," etc., but it may properly be, as in this case, in the form of a resolution, but whatever its form, it amounts in substance to an ordinance, and must be passed in the mode prescribed for the passage of ordinances.

It is provided in section forty of the Consolidation Act, that the Board may order a street to be graded after notice of their intention has been published in a daily newspaper for the period of ten days, unless the owners of a specified proportion of the lands or lots bounded by the street shall make written objection thereto. The declaration of intention is the fundamental act of the whole proceeding to grade the street, and in the absence of the declaration of intention manifested by an ordinance or some act that is its equivalent in substance and effect, though differing from it in form, the whole proceedings must fail of compulsory effect. The manner of making the declaration of intention is not specified in the Act, but the power to make the declaration is conferred upon the Board and expressed in the same general terms as in the preceding and subsequent sections, is the authority to lay out a street or to order a street to be graded, and it is impossible to see why an ordinance or a resolution is not as requisite in declaring the intention to grade the street, as in ordering the street to be graded. If it is said that the resolution of intention is not comprised within the meaning of the words "every ordinance or resolution of the Board of Supervisors providing for any specific improvement," as used in section sixty-eight, it may be answered that the declaration of intention, whatever may be its form, is a legislative act, and as such must be passed in

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the mode prescribed by law, and for that purpose it must be presented to the President of the Board for his approval.

Rehearing denied.

SAWYER, J. concurring specially.

I concur in denying a rehearing for reasons different from those expressed in the opinion. I also dissent from the construction given in the opinion to sections forty and sixty-eight of the Consolidation Act.

THE PEOPLE v. JESUS YSLAS.

IMPEACHING A WITNESS.—Evidence of bad character for chastity is not admissible for the purpose of impeaching the testimony of a witness.

SAME.—An inquiry into the character of a witness for the purpose of impeaching his testimony must be restricted to his character for truth and veracity.

AN ASSAULT.—The statutory definition of an assault is substantially the same as at common law.

SAME.—An intent to commit violence, accompanied by acts which, if not interrupted or avoided by the retreat of the other party, would be followed by personal violence, amounts to an assault.

SAME.—It is not indispensable to the commission of an assault that the assailant should be at any time within striking distance.

TESTIMONY IN CRIMINAL CASE.—On trial for an assault with intent to commit murder it appeared that the defendant committed the assault in the prosecutrix's house, and the prosecutrix immediately escaped and went to a butcher shop a few rods away, and that the defendant followed her thither after some few minutes had elapsed; *Held*, that what occurred between the prosecutor and defendant at the butcher's shop was admissible in evidence, at least on the question of intent.

WHAT IS AN ASSAULT.—To constitute an assault the party must have the intent to strike, the ability to do so, and must make the attempt.

CURREY, J.

IMPEACHMENT OF WITNESS.—Testimony to impeach a witness should not be confined to his character for truth and veracity, but should extend to his entire moral character, and a witness may be impeached by testimony showing that his general moral character is bad.

APPEAL from the County Court of Santa Clara County.

The testimony for the prosecution showed that the defendant entered the house of the prosecutrix and called for liquor, and was refused. He insisted, and it was given to him, when he

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called on the prosecutrix to drink, and upon her declining to do so, threw the tumbler on the floor, threatened to kill her, and seized a hatchet and started towards her having it raised in a threatening attitude. The prosecutrix, when the defendant had approached within seven or eight feet of her, fled through the door into an adjoining room, and locked the door after her. The defendant then went up to the door and struck it with his hatchet. The prosecutrix, after waiting a few minutes, passed through another door and went to a butcher shop a few rods distant. The defendant, after waiting a short time, followed the prosecutrix to the butcher shop and again threatened her life.

The attorney for the defendant asked the Court to give the following instructions, which were refused:

"If the jury believe from the evidence that when the defendant rose from taking the hatchet in his hand, and before raising it in a striking posture, the prosecutrix, on whom the assault is alleged to have been made, had left the room in which he and she were, and shut the door, they will find the defendant not guilty as charged in the indictment, because whatever may have been his intention in taking hold of the hatchet, there was an absence of ability to carry the same into effect.

"If the jury believe from the evidence that defendant, while with the hatchet in his hand, did not attempt to throw the same at the prosecutrix, and did not raise it to strike her while within striking distance, they will find him not guilty as charged in the indictment.

"The testimony of the witness as to what took place in the butcher shop does not go to sustain the charge in the indictment, because the defendant had not at the time or there any weapon in his hand as charged in the indictment."

The other facts are stated in the opinion of the Court.

J. Alexander Yoell, for Appellant, referred to the following authorities on the question of the impeachment of the witness: 1 Greenleaf on Ev., note 2, p. 59; *People v. Rector*, 19 Wend.

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570; *People v. Murphy*, 14 Mass. 387; *State v. Boswell*, 2 Dev. 209; 1 Hill, S. C. 251.

J. G. McCullough, Attorney-General, for the People.

An assault is committed when the defendant, with the intent, makes the offer to commit the violence, with the apparent though not the actual power, not necessarily within striking distance, but so near as to put a man of ordinary firmness not in actual but in well founded apprehension of peril. And these are the true ingredients of the common law and of the statutory assault. In both there is the "unlawful attempt, coupled with the present ability to commit the injury," etc.

And we refer to some authorities, and especially to Bishop, the most philosophical criminal law writer of the age: *State v. Davis*, 1 Iredell, N. C. 125; 1 Whar. Crim. Law, §§ 1,241-3; 2 Bishop's Crim. Law, §§ 32, 36, 37, etc.; 1 Bishop's Crim. Law § 409.

The defendant in such a case as this had no right to show the prosecutrix was unchaste. If the offer was because she was the party injured, then it was inadmissible. (3 Greenleaf on Ev., § 27.) If to impeach her like any other witness, then also the better opinion is it was inadmissible. The evidence as to character in every case, whether of party or witness, should bear some analogy and have some reference to the nature of the charge. In this case the trait in the character to be inquired into was that of the general reputation for truth and veracity *only* of the prosecutrix. (1 Greenleaf on Ev. § 461 n; 1 Wharton on Crim. Law, § 814; *People v. Josephs*, 7 Cal. 129.)

By the Court, SANDERSON, C. J.

The defendant was indicted for an assault with intent to commit murder, tried and convicted as charged.

At the trial the defense proposed to impeach the testimony of the prosecutrix by proving her to be of a notoriously bad character for chastity. The testimony was rejected by the

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ground that the decision of the Court in that respect was erroneous.

That the ruling of the Court is sustained by the great mass of authority is not disputed by counsel for appellant; but it is insisted, notwithstanding, that the better reason is opposed to it. We do not deem it necessary to enter into a discussion as to what the law ought to be upon this subject. There is much force in the argument made in support of the theory that the inquiry into the character of a witness, for the purpose of impeaching his testimony, ought not to be restricted to his reputation for truth and veracity; but the rule is too well settled the other way for us to disturb it. If it is thought that the ends of justice would be subserved by changing the rule so as to make the entire moral character of the witness in the estimation of society the subject of inquiry, let the change be made by the Legislature, and not the judiciary.

The instructions asked for on the part of the defendant were properly refused. The first and second seem to be founded upon the idea that there is a substantial difference between an assault at common law and an assault as defined in our statute. In our judgment no such distinction exists. The common law definition of an assault is substantially the same as that found in the statute. (1 Russell on Crimes, 748; 1 Wharton, Section 1,241.) The vice in the two instructions under consideration is found in the idea which they countenance that there may be an intermediate point between the commencement and the end of an assault where if the assailant is interrupted either by the escape of the party assailed or the interference of bystanders, the offense is thereby made incomplete.

In order to constitute an assault there must be something more than a mere menace. There must be violence begun to be executed. But where there is a clear intent to commit violence accompanied by acts which if not interrupted will be followed by personal injury, the violence is commenced and the assault is complete. Thus riding after the prosecutor so as to compel him to run into a garden for shelter, to avoid

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being beaten, was held to be an assault. (*Martin v. Shoppee*, 3 Car. & Payne, 374.) So where the defendant was advancing in a threatening attitude, with intent to strike the plaintiff, so that his blow would in a second or two have reached the plaintiff, if he had not been stopped, although when stopped he was not near enough to strike, it was held that an assault had been committed. (*Stephen v. Myers*, 4 Car. & Payne, 349.) It is not indispensable to the commission of an assault that the assailant should be at any time within striking distance. If he is advancing with intent to strike his adversary and comes sufficiently near to induce a man of ordinary firmness to believe, in view of all the circumstances, that he will instantly receive a blow unless he strike in self defense or retreat, the assault is complete. In such a case the attempt has been made coupled with a present ability to commit a violent injury within the meaning of the statute. It cannot be said that the ability to do the act threatened is wanting because the act was in some manner prevented. In the present case the defendant was guilty of an assault if he advanced on the prosecutrix in such a manner as to threaten immediate violence, notwithstanding she succeeded in making her escape without injury.

The third instruction asked for by the defendant was also properly refused because what occurred in the butcher shop appears to have been a part of the *res gestæ*, and at least was admissible on the question of intent.

The third instruction asked for by the prosecution, to the effect that the assault was complete if the defendant had the intent to strike and the ability to do so, when by itself considered, is a little inaccurate in so far as it can be said to ignore the idea of an attempt. But this portion must be read in connection with the residue of the charge, which sufficiently informed the jury as to what constituted the attempt, to wit, the defendant's rushing toward the prosecutrix with the axe in his hand in such a manner as to show that he could and would have struck her had she not escaped through the door.

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Taking the entire charge together, we do not think the jury could have misapprehended the law of the case.

As to the question whether the verdict is sustained by the evidence, it is sufficient to say that the testimony is conflicting.

Judgment affirmed. "

CURREY, J., concurring specially.

The rule restricting the examination of impeaching witnesses to the general character for truth and veracity of the witness sought to be impeached, I do not understand to be settled to the exclusion of the broader inquiry as to his general character or general moral character, and in my judgment the examination ought not to be so restricted. In England the inquiry in such cases involves the entire moral character of the witness attempted to be impeached, and the estimation in which he is held in society. (2 Taylor's Ev. Secs. 1,082, 1,083.) The authorities on this point may be found collated in 3 American Law Journal, 145, where it is said, "So far as the decisions of the Courts of England are concerned, they are unanimous to the point that the true criterion of the credit of the witness, is his general character and conduct, and not his character for truth and veracity."

In New York the rule allowing an inquiry respecting the general character of the witness sought to be impeached obtains. (*People v. Mather*, 4 Wend. 229; *People v. Rector*, 19 Wend. 579; *Johnson v. People*, 3 Hill, 178; *Fulton Bank v. Benedict*, 1 Hall, 558.) In *Fulton Bank v. Benedict*, Mr. Justice Oakley—a very able Judge—held the true rule to be to inquire of the impeaching witness his means of knowing the general character of the witness impeached, and whether from such knowledge he would believe him under oath. And he further said, "To inquire only as to general character for truth seems too narrow. His general character for truth and honesty must be the ground of his general credit as a witness."

In Kentucky the rule is to allow an inquiry as to the general character of the witness attempted to be impeached.

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(*Hume v. Scott*, 3 A. K. Marsh. 261; *Blue v. Kibby*, 1 Monroe, 195.) In South Carolina (*Anonymous*, 1 Hill, 258,) the Court of Appeals of that State held that the inquiry need not be restricted to general character for truth only, but that the true inquiry was as to the witness' general character. The Court says: "If the witness assailed is of general bad moral character, his general character, in legal contemplation, is a bad one in all respects. For a general bad moral character can only exist where a man's vices so far preponderate over his virtues as to force the conclusion in the mind of a majority of his acquaintances that he is a bad man." In North Carolina, as early as 1804, it was decided that a witness might be discredited by proving him of bad moral character, and that the inquiry should not be confined to the general character of the witness for veracity. (*State v. Stallings*, Martin & Harwood, 490,) and twenty-five years afterwards the Supreme Court of that State reiterated the rule in an opinion of great cogency and power. (*State v. Boswell*, 2 Dev. 210.) The same rule is laid down by the Supreme Court of Pennsylvania in *Wilke v. Lightner*, 11 Serg. and Rawle, 198. Mr. Chief Justice Pennington, of New Jersey, in illustration of the fallacy of the rule confining the inquiry to the character of the witness for veracity, said: "Suppose a witness is a notorious cheat, sharper and swindler, although nothing has been alleged against him on the ground of his veracity under oath, is he to stand in point of credit on equal ground with a man of unblemished character and good standing in society? Reason revolts at the idea. I take it that the general character of the witness, so far as it goes to show turpitude of mind, is in issue, less credit being due to a corrupt mind than a pure one." (2 Cow. Treat. 451.)

The decisions and authorities to which I have referred, and the reasons on which they are founded, to my mind, are conclusive that the inquiry as to the character of the witness sought to be impeached ought not to be confined to his character for truth and veracity. Such a limitation necessarily excludes all discrimination between men of bad characters,

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except as the same may be generally known and understood as to their truth and veracity, and men of unsullied lives and corresponding reputations. If the general character of a witness which is proverbially and notoriously bad as a sharper or a swindler, or whose life is steeped in vice and immorality, may not be established to be as it is generally reported among his neighbors and acquaintances—though his character and reputation as to truth and veracity in terms may not have been the general subject of discussion—then such witness stands upon an equality with him whose character is without stain and whose life, at every stage of it, has been distinguished by the performance of every duty. For jurors, sworn to try the case before them according to the evidence, though they may know without the aid of testimony produced upon the trial of the wide difference between the characters of the two witnesses, are precluded notwithstanding their knowledge derived before the trial from observing such difference, for the reason that they are sworn a true verdict to give according to the evidence. Thus it is seen that the witness of bad character may secure by his testimony a verdict which would have never had existence, if the truth as to his general character could have been made manifest.

I am unable to perceive wherein any material inconvenience would be likely to result from the adoption of the broad rule opening the door to inquiry respecting the general character of witnesses upon whose testimony the rights of litigants are made to depend. Good men need not fear the ordeal of an examination of their character, while the vicious and dishonest, to a degree securing for themselves notoriously bad reputations, should be weighed in the balance by which their actual comparative worth and worthlessness may be determined.

The defendant proposed at this trial to impeach the prosecutrix on the ground that her character was notoriously bad in one particular, and the testimony was rejected. The offer was not within either of the rules of inquiry which I have considered, but was in violation particularly of the one which

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I have endeavored to show should be adopted; and therefore I think the judgment should be affirmed.

THE PEOPLE v. AWA.

COMPETENCY OF WITNESSES.—A restriction upon the competency of a witness must be strictly construed in favor of life, liberty, and public justice.

CHINESE WITNESSES.—A defendant in a criminal case who is a Chinaman is entitled to introduce Chinese witnesses in his behalf.

Per SANDERSON, C. J.—The words “in favor of or against any white person,” in the Act prohibiting persons of one half or more Indian blood, or Mongolian or Chinese, from giving evidence, refer to the defendant alone in a criminal action.

APPEAL from the District Court, Eighth Judicial District, Del Norte County.

The defendant appealed.

The other facts are stated in the opinion of the Court.

J. P. Haynes, for Appellant.

J. G. McCullough, Attorney-General, for the People.

By the Court, SAWYER, J.

The appellant, a Chinaman, was convicted of manslaughter. On the trial he offered another Chinaman as a witness on his behalf. The District Attorney objected to his examination on the ground, that he is incompetent to testify for or against a white person, and the testimony of the witness was excluded by the Court. Section fourteen of the “Act concerning crimes and punishments,” relied on by respondents, reads as follows: “No Indian, or person having one half or more of Indian blood, or Mongolian, or Chinese, shall be permitted to give evidence in favor or against any white person.” (Laws 1863, p. 69.)

This restriction upon the competency of a witness must be strictly construed in favor of life, liberty and public justice. The people as a political organization—the State—and not any individual member of the community, is the party on one

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side. The terms of the Act do not strictly apply to the People as a political organization, and we think the plaintiff—the State—is not a white person within the meaning of its provisions.

For this error the judgment must be reversed and a new trial had, and it is so ordered.

SANDERSON, C. J., concurring.

The words “in favor or against any white person,” found in the fourteenth section of the Act concerning crimes and punishments, are manifestly intended to refer to the defendant only in a criminal action, and not to the plaintiff. If we read them as referring to the People as well as to the defendant, the effect is to exclude the races in question from the witness stand in all cases, regardless of the race of the defendant, for in criminal actions the plaintiff is always the same. Such however was not the intention of the Legislature. Had it been, they would have declared the incompetency of the races in question in general terms unaccompanied by words of limitation. Where the defendant in a criminal action is a white person, Indians and Mongolians are incompetent witnesses, but in all other cases their competency is unaffected by the statute in question.



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CHARLES J. LEACH v. T. B. DAY.

INJUNCTION TO RESTRAIN TRESPASSES.—An injunction will not be granted to restrain the commission of trespasses where the party complaining has a complete and adequate remedy at law.

COMPLAINT TO ENJOIN TRESPASSES.—Where a complaint, in an action to restrain the commission of trespasses, avers that the defendant has torn down the fences of plaintiff, and entered his close for the purpose of opening a private road across plaintiff's land, under a claim of right founded on an order of a Board of Supervisors laying out a road, and does not state that the right has been settled in an action at law, and that the defendant continues his acts after a Court of law has decided against him, it does not state facts sufficient to constitute a cause of action.

AN ORDER LAYING OUT A ROAD.—An order of a Board of Supervisors laying out a road, which is unconstitutional and null and void upon its face, does not affect or cloud the title to the land over which it passes, and an injunction will not be granted to restrain the carrying of the order into effect, but the party will be left to his remedy at law.

Argument for Appellant.

APPEAL from the District Court, Fifth Judicial District, San Joaquin County.

The complaint averred that the plaintiff was the owner of land lying between the land of defendant and the Upper Sacramento Road, and had applied to the Board of Supervisors to lay out a private road from defendant's land to said road, and that such proceedings were had in the Board that a private road was pretended to be laid out forty feet wide and forty rods, more or less, in length, and that plaintiff believed the acts of defendant were committed in order to open the road. The defendant demurred to the complaint, and the demurrer was overruled by the Court. A preliminary injunction was granted at the commencement of the action, which, upon the final trial, was made perpetual. The defendant appealed.

The other facts are stated in the opinion of the Court.

John C. Byers, and Budd & Carr, for Appellant.

The complaint does not state facts sufficient to warrant an injunction, either preliminary or perpetual. It does not allege that the threatened injury would be irreparable, or that it went to the substance or value of the estate in the character in which it was enjoyed, or that defendant was insolvent. Some such allegation has always been held requisite to maintain an action for an injunction. (See *Jerome v. Ross*, 7 Johns. Ch. R. 315; *Frost v. Beekman*, 1 Johns. Ch. R. 318; *Hanson v. Gardiner*, 7 Vesey, 305; 2 Story's Eq. Jur. Sec. 925; *Burnett v. Whiteside*, 13 Cal. 156; *Branch Turnpike Company v. Sup. Yuba County*, 13 Cal. 196; *Tomlinson v. Rubio*, 16 Cal. 202; *Hihn v. Peck*, 18 Cal. 640; *Robinson v. Russell et al.*, 24 Cal. 467; *Tevis v. Ellis, Calderwood et al.*, 25 Cal. 520.)

Tyler & Cobb, for Respondent, referred to McCann v. Sierra County, 7 Cal. 121, as authority for the injunction, and also to *Hicks v. McMichael*, 15 Cal. 107.

By the Court, SANDERSON, C. J.

We deem it unnecessary to determine whether the road laws of this State are unconstitutional so far as they authorize the laying out and establishing of private roads. It is not necessary to determine that question in order to finally dispose of this action. All that the plaintiff claims on that score may be conceded without its following therefrom that he is entitled to the relief which he seeks. Admitting that the Act of the Legislature empowering the Board of Supervisors to lay out and open private roads is unconstitutional, and that therefore their acts in laying out and opening a private road for the use of the defendant across the land of the plaintiff are null and void, it only follows that the grounds upon which the defendant seeks to justify his acts have failed him, and he stands convicted of the trespass alleged in the complaint.

Leaving this constitutional question out of view it only remains to determine whether on the case made by the complaint the plaintiff is entitled to an injunction.

The complaint merely alleges that the defendant on a day stated, and at divers other times between that day and the commencement of the action broke and entered the close of the plaintiff and did by himself and servants tear down and destroy the fences of the plaintiff to his damage in the sum of fifty dollars, for which he prays judgment. Such is the nature and extent of the trespass alleged in the complaint.

For the purpose of obtaining an injunction the complaint thereafter proceeds and shows that the trespass in question was committed by the defendant under a pretended claim of a right of way over the plaintiff's land by virtue of a pretended order of the Board of Supervisors, opening and establishing a private road for his use, and that the defendant threatens to tear down the plaintiff's fences at each end of the road as often as he erects the same — wherefore he asks an injunction.

The bare statement of these facts is a complete answer to the prayer for an injunction. No reasons are given or attempted to be given why the plaintiff has not an adequate and

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complete remedy at law; on the contrary it is apparent, from the nature of the case stated, that he has. Where such is the case, equity will not interfere, but will leave the complainant to his action at law. The whole case made is merely that the defendant, under a claim of right, has torn down three or four lengths of the plaintiff's fence, and threatens that he will do it again if the plaintiff puts it up. By themselves considered, the acts in question have none of those elements which lie at the foundation of equity interference in cases of trespass. All that the defendant has done has been done under a claim of right, founded upon an order of a lawful tribunal, having, as he claims, full power and jurisdiction to make it. Whatever he threatens to do he threatens to do under the same claim of right. This being the first action which has been brought, and it appearing that the defendant is acting under a claim of right, there is no pretense for saying that he will continue his acts after a Court of law has once determined the right under which he claims to act against him. The threatened trespass is not irreparable, either from the nature of the injury itself, or from the want of responsibility in the party threatening its commission.

Anciently Courts of equity would not interfere at all by injunction in cases of trespass, but left the party to his legal remedy. In modern times, however, this doctrine has been very much relaxed, and although the general rule remains, yet there are exceptional cases where equity does and will interpose, but a strong case must be made. It will interpose for the purpose of quieting a possession or preventing a multiplicity of actions, or where the value of the inheritance is put in jeopardy, or where irreparable mischief is threatened in relation to mines, quarries or woodland, whether the same result from the nature of the injury itself or from the insolvency of the party committing it. (*West v. Walker*, 2 Green's Ch. R. 279; *Van Winkle v. Curtiss*, Ib. 422; *Kerlin v. West*, 3 Ib. 449.) Obviously the case at bar does not come within either of the foregoing exceptions. It does no more than present a case of naked trespass for which an action at law, for

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aught that yet appears, affords an ample and adequate remedy.

But it is insisted on the part of the respondent that this is not an ordinary action of trespass, and it is argued that it is like the case of *McCann v. Sierra County*, 7 Cal. 121, and rests upon the same principle. The facts of that case were that the Board of Supervisors had, by resolution, extended a street or public thoroughfare through the land of the plaintiff without providing any compensation for the private injury consequent thereon, and were in the act of opening the street through the land of the plaintiff at the time the complaint was filed. The complaint asked for five hundred dollars damages and a perpetual injunction. The case went off upon demurrer to the complaint, upon the ground that the plaintiff's claim for damages had never been presented to the Board of Supervisors for allowance, and rejected in whole or in part, as required by law. In the course of his opinion, Mr. Chief Justice Murray remarks, that the act of the Supervisors in appropriating the land of the plaintiff to public use before compensating him for the value thereof, was illegal, and he might resort to a Court of equity to restrain them. That doctrine is undoubtedly correct. It proceeds upon the theory that the Board of Supervisors have the power to condemn private property for public use, upon making compensation therefor. Such condemnation, if legally accomplished, acts directly upon the title and takes it practically from the individual and vests it in the public; if not done legally and in accordance with the Constitution, it nevertheless, by reason of the existence of the acknowledged power, casts a cloud upon the title which is the ground of equitable interference in such cases.

In our judgment there is no analogy between the two cases, and however applicable the dictum, upon which respondents rely with so much apparent confidence, may have been to the facts of that case, it has no application here. This is not an action to restrain the Board of Supervisors from taking the land of the plaintiff and appropriating it to public use without

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providing any compensation whatever for its value. Had this action been brought against the Board of Supervisors before or at the time they were engaged in laying out the private road in question upon the theory that they had the power to do so, but were not proceeding according to law, and had made no provision for compensating the plaintiff for the value of his land, the doctrine and the case invoked would have been in point. But this is not an action against the Board of Supervisors, and it does not proceed upon the theory that they have the power in question, and are attempting to exercise it without first complying with the condition upon which its exercise is only permitted; on the contrary, it is an action against a private individual, who confessedly has not the power to take the plaintiff's property from him and apply it to either a public or private use, under any circumstances, and whose acts, therefore, are necessarily nothing more than a naked trespass, and can in no respect affect the plaintiff's title, or put the inheritance in jeopardy, or, as we have already seen, work in any respect an irreparable injury. Not does it even proceed upon the theory that the Board of Supervisors had the power to do the acts complained of, and thereby either totally deprive the plaintiff of his freehold, or at least cast a cloud upon his title, but, on the contrary, proceeds upon the theory that the Board had no such power, and, therefore, the title of the plaintiff to the land and his possession, and right of possession, are wholly unaffected thereby.

We may add that, so far as the plaintiff's right to equitable relief is based upon the alleged invalidity of the acts of the Board of Supervisors in laying out the road in question, the complaint is manifestly *felo de se*. If, as contended, those acts are absolutely null and void on their face upon the ground that the Act under which they were had is unconstitutional, it follows that they cannot hurt the plaintiff, for they have not even the appearance of legality, and, therefore, cannot affect or cloud in any manner his title. In such a case he has no need for an injunction, and, therefore, is not entitled to one.

Argument for Respondents.

Our conclusion is that the demurrer to the complaint ought to have been sustained.

Judgment reversed and cause remanded.

**J. MARRINER AND D. WILLARD, v. RUFUS SMITH
AND HENRY GOODING.**

REMOVAL OF LIEN OF A JUDGMENT FROM LAND.—One who purchases land subject to the lien of a judgment obtained by fraud against his grantor is not entitled to have a Court of equity remove the judgment lien and enjoin a sale of the land under the judgment, unless he shows affirmatively that he will be injured by an enforcement of the lien by a sale of the land on execution.

LIEN OF JUDGMENT AGAINST HUSBAND ON THE HOMESTEAD.—If, while a judgment is standing against the husband, the husband and wife make a sale of the homestead, and at the same time make a relinquishment of the homestead right in the manner required by law, so that the two constitute but one transaction, and the homestead does not exceed in value five thousand dollars, the lien of the judgment will not attach to the homestead, and a Court of equity will enjoin a sale of the same upon an execution issued on the judgment.

SAME.—If husband and wife make a relinquishment of the homestead right, and afterwards sell the homestead property, and the relinquishment takes effect before the sale, the lien of the judgment will attach to the property.

MAKING UP TRANSCRIPT ON APPEAL.—If an amended complaint and answer are filed, and no question arises on the original pleadings, it is not necessary to include them in the transcript on appeal. Other abbreviations of transcript are indicated in the opinion.

APPEAL from the District Court, Fourteenth Judicial District, Placer County.

The facts are stated in the opinion of the Court.

Charles A. Tuttle, for Appellants.

Jo Hamilton, for Respondents.

There can be at this day little doubt that under authority of the following, besides numerous other decisions of like import, that a suit to remove or prevent a cloud upon plaintiff's title, may be maintained; indeed, it would be his only remedy. (*Shattuck v. Carson*, 2 Cal. 588; *Guy v. Hermance*, 5 Cal. 75; *Alverson v. Jones*, 10 Cal. 11; *Pixley v. Huggins*, 15 Cal. 133.)

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It will very readily be seen, that if Smith obtained his judgment, as in this instance, before the sale to respondents, and while the property was a homestead, and Goode and wife afterwards divest the lands of their homestead estate, for the purpose of sale to respondents, they came to defendants' hands cumbered with the judgment lien. If, then, the Sheriff be permitted to go on and sell the lands under this fraudulent judgment, a cloud would rest on respondents' title. It was not necessary to aver ignorance on the part of the respondents of the existence of this judgment, or that they had not bought the property, *cum onere*; the invalidity of the judgment once established, then knowledge or ignorance was not material.

By the Court, SAWYER, J.

On the 16th day of November, 1861, the defendant, Smith, recovered a judgment upon a promissory note in the District Court for the County of Placer, against one D. B. Goode for the sum of four hundred and sixty-four dollars. At the date of said judgment said Goode was the owner of the lands described in the complaint, which lands constituted his homestead. Subsequent to the entry of said judgment, an instrument of abandonment of said homestead was duly executed and acknowledged by said Goode and wife, and regularly recorded, and the premises were conveyed by said Goode and wife to plaintiffs; but whether the abandonment and conveyance were contained in one instrument, does not appear. In October, 1863, subsequent to said conveyance, Smith procured an execution to be issued upon his said judgment against Goode, and placed it in the hands of the defendant, Gooding, Sheriff of Placer County, who was proceeding thereunder by the direction of said Smith to sell said lands. Plaintiffs thereupon commenced this action to restrain the sale, and thereby prevent the defendants from further clouding their title, and to procure a cancellation of the judgment as a fraud upon their rights. In addition to the foregoing facts, the plaintiffs

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allege in their complaint, that on the 5th day of November, 1861, after the commencement of said suit by Smith against Goode, and before the entry of judgment therein, said Goode and said Smith settled said suit, and said Goode delivered to said Smith a horse of the value of three hundred dollars, and other property specified, exceeding in value, in the aggregate, the amount due in the matter in suit, and that said Smith accepted the said property in full payment and satisfaction of the entire amount due, and in consideration thereof, agreed with said Goode to dismiss said suit, and that the same should not be further prosecuted; that said Goode, relying upon said promise, and supposing the said suit would be dismissed, paid no further attention to it; that said Smith, in violation of said agreement, and without the knowledge or consent of said Goode, and in fraud of his rights, did, nevertheless, cause said judgment to be entered by default; and that said judgment was thereby obtained by fraud, upon a demand which had been fully paid, satisfied and discharged. The Court found the facts to be as alleged, and rendered a judgment annulling and setting aside the said judgment, also perpetually enjoining any sale under it; from which judgment defendants appeal.

The grounds of appeal are, that the facts alleged in the complaint, and found by the Court, are insufficient to entitle plaintiffs to the judgment rendered, or to any relief.

Goode, the defendant in the judgment vacated, is not a party to this action. He has made no complaint against the judgment. Of course the plaintiffs cannot interfere on his behalf, and they have no interest in the matter, except so far as the judgment lien may affect their property. They have no right to have the judgment absolutely vacated and annulled. The only question is, as to whether plaintiffs stand in such a relation to the judgment against Goode and the parties thereto, as to entitle them to the aid of a Court of equity to remove a judgment lien upon the land described in the complaint, and to an injunction against a sale under said judgment.

The judgment was in existence long before, and at the time plaintiffs took their conveyance, and they had record notice of

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the lien of said judgment, if any there was. It is not alleged, and it nowhere appears, that defendant Smith, and Goode, or either of them, practiced any fraud upon plaintiffs, or that plaintiffs did not assume the payment of the judgment as a part of the purchase price. It does not appear that they paid full value for the premises upon the understanding, that the judgment was satisfied, or void, or even that they paid anything at all for the land. If they took the land subject to the lien, and with an understanding that they were to discharge it, they certainly have no grounds to complain that they are compelled to pay the judgment. The presumption is that the plaintiffs have stated their case as favorably to themselves as the facts will admit. Yet it nowhere appears that they are, or can be, injured by the judgment. That Goode should pay the amount due defendant, Smith, twice is a matter of no concern to plaintiffs. If plaintiffs did in fact knowingly purchase the land, subject to the judgment, at a less price than its value in consequence of the lien upon it, they have no ground of complaint, and it rests upon them to affirmatively show that they are injured. This we think they have failed to do.

The complaint also alleges, that the premises in question were, on the twenty-third day of October, 1861, dedicated by Goode as a homestead in the mode prescribed by law, and that said premises at the date of said conveyance to plaintiff were still owned by said Goode, and occupied by himself, wife and family as a homestead, and that both said Goode and wife made, executed and delivered the conveyance therefor, and made the proper relinquishment of homestead in the manner provided by law for the sale of homesteads. These allegations are not denied by the answer, and for the purposes of the action must be taken as true. Conceding that it sufficiently appears that the relinquishment of the homestead and the conveyance constituted one transaction, and took effect at the same moment of time, and that the value of the homestead did not, at the time of said relinquishment and conveyance, exceed five thousand dollars, the judgment, even if valid, never constituted a lien; for, while the title remained in Goode, there

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was nothing subject to the lien of the judgment, or to a sale upon execution. Upon such a state of facts, the plaintiffs would perhaps be entitled to have the judgment against Goode adjudged not to be a lien upon the land, and to a perpetual injunction against a sale. A sale, notwithstanding the judgment, for the reasons stated, might not be a lien upon the land, would tend to cloud the title, upon the principle announced in the case of *Pixley v. Huggins*, 15 Cal. 128, and other cases affirming it. But it is nowhere averred that the value of the premises did not exceed five thousand dollars. Besides, as if to cut himself off from this ground of relief, the plaintiff, in a subsequent allegation, expressly avers the said judgment to be a lien upon said land of older date than the plaintiff's deed and relinquishment of homestead. The allegation is not very distinct, that the relinquishment and conveyance constituted one transaction and took effect at the same time, nor does the date very clearly appear. If the relinquishment of homestead took effect before the conveyance, the lien of the judgment attached. For the reasons stated we are of the opinion that the facts alleged and found are insufficient to entitle plaintiff to the relief sought and obtained. The judgment must therefore be reversed, and the cause remanded for further proceedings. We think the plaintiff should have leave to amend his complaint.

In this case, as in many others, the appellant has overlooked the amendment of 1864 to section three hundred and forty-six of the Practice Act, and has consequently incurred double the expense necessary in making up his transcript on appeal. The transcript, it is true, is not voluminous, but it is still nearly or quite three times as large as necessary. As will be seen by referring to the amendment indicated, it is not necessary in all cases to bring up the entire judgment roll. In this case the original pleadings and summons might have been omitted, as no question arises on them. The amended complaint and answer thereto formed the issues tried. The entire first half of the transcript, therefore, is utterly useless here. And no inconsiderable portion of the remainder is taken up

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with titles of the cause in the several papers, indorsements upon each paper filed, and verifications in full. Each time the style of the Court and title of the cause is repeated, one half of a printed page is taken up, and the indorsement of title, names, etc., on each paper, takes another half page. Where papers are short and numerous, such repetitions are frequent, and constitute a very large portion of a transcript. All this is unnecessary, especially where the transcript is made up and certified under the rules of Court by the attorneys of the respective parties, as is now usually done, and as was done in this case; and when the transcript is certified by the Clerk the certificate can easily be adapted to such omissions of irrelevant and useless matter. It is sufficient when the style of the Court, and title of the cause is given in the first paper, to afterward give the name of the document and at the head say, "Title of cause." And where a paper is verified or acknowledged, and no point is made on the verification or acknowledgment to say, "Duly verified," or, "Duly acknowledged." *The date of the paper, date of filing, date of service, etc., and every indorsement that may be important should, of course, appear.* The rest may, with advantage, be omitted.

Attorneys, in making up their transcripts, by observing these suggestions, will still further greatly diminish the expense of making up and printing records, and thereby also facilitate the examination of the record on the part of the Court.

Judgment reversed and cause remanded, with leave to plaintiff to amend his complaint, as he may be advised.

Mr. Justice SHAFER expressed no opinion.

Points decided.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* THE CENTRAL PACIFIC RAILROAD COMPANY OF CALIFORNIA v. THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, AND WILHELM LOEWY, CLERK OF THE CITY AND COUNTY OF SAN FRANCISCO.

MANDAMUS.—The rules of the Civil Practice Act are applicable to pleadings and proceedings in mandamus.

ANSWERS TO PETITION FOR MANDAMUS AGAINST A BOARD OF SUPERVISORS.—

In a proceeding against a Board of Supervisors, in its corporate capacity, to procure a writ of mandate, the answer of one or more than one of the Supervisors in his or their own name or names, whether as Supervisor or otherwise, cannot be regarded as the answer of the Board, and, on motion, will be stricken from the files of the Court.

SAME.—In such case the answer should be in form the answer of the Board in its aggregate capacity.

SAME.—In such case, if an answer is filed in due form as the answer of the Board, the presumption is that it is the answer of the Board; and the fact that it was sworn to by one member of the Board does not make it his answer, nor is it necessary that such answer should aver that the Board by resolution adopted it.

SAME.—In such case, if two answers are filed each in form the answer of the Board, the Court may ascertain which is the return of the majority.

MOTION FOR JUDGMENT ON PLEADINGS IN MANDAMUS.—In proceedings to procure a writ of mandate, a motion of the relator for judgment on the pleadings is equivalent to a demurrer to the answer, on the ground that it does not state facts sufficient to constitute a defense to the action. Objections to the answer which are required to be taken by special demurrer, or by motion to strike out, will be disregarded on such motion.

DENIALS IN ANSWER OF ALLEGATIONS OF COMPLAINT.—If the complaint contains averments of the rendition of a judgment against the defendant by a Court of competent jurisdiction, and states the character of the judgment, an answer denying that the defendant became or was lawfully bound by the judgment, is only a denial of a conclusion of law, and does not raise an issue of fact. If the judgment can be attacked collaterally, the answer must specify the points of its invalidity.

SAME.—If a complaint avers the passage of an ordinance by a municipal corporation, and the answer in reply states in general terms that the ordinance is illegal and void, no issue of fact is raised.

MATTERS *res judicata*.—If a judgment has been rendered by a Court of competent jurisdiction, and a certain matter was necessary to be averred in the complaint and found to be true by the Court, to authorize the rendition of the judgment, the truth of this matter becomes *res judicata*, and not subject to be again litigated between the same parties.

RIGHT TO SHOW THAT AN ELECTION WAS INFLUENCED BY BRIBERY.—If a majority of the electors of a municipal corporation vote in favor of a proposition for the corporation to subscribe to the capital stock of a railroad company, under a law directing such subscription to be made if such majority vote is obtained, the municipal authorities, on proceedings to compel

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them to make such subscription, have a right to allege and show that the election was not fairly conducted, but was influenced by bribery and corruption practised and perpetrated by the railroad company and its employés.

CONTRACT PROCURED BY FRAUDULENT MISREPRESENTATIONS.—An answer seeking to avoid a contract sued on by reason of fraudulent misrepresentations of the plaintiff in procuring it, must state in what the misrepresentations consisted, and they must be of matters of fact of which defendant was ignorant, and not of law.

PUBLICATION OF AN ORDINANCE.—The publication of an ordinance alone is sufficient to give it validity without a publication of the law authorizing it. All persons are charged with notice of a law on which the ordinance is founded.

CONTRACT BETWEEN CORPORATIONS.—A proposition made by some corporate act of a railroad corporation to the authorities of a municipal corporation, and an acceptance of the terms thereof by an ordinance of the municipal corporation, constitutes a contract between them.

HOW MUNICIPAL CORPORATION MAY CONTRACT.—A municipal corporation may contract by ordinance, and an ordinance accepting of the terms of a proposition made to the municipality amounts to an assent to the contract on the part of the corporation, and not a mere declaration of intention to enter into a contract.

AID TO A RAILROAD BY A MUNICIPAL CORPORATION.—If a municipal corporation has become bound by a vote of its electors, taken under a law of the Legislature, to subscribe to the stock of a railroad company, and pay the amount of its subscription in its bonds, and then makes a compromise with the railroad company by which it agrees to deliver the company a less amount of its bonds in consideration of being released from its subscription, the delivery of this less amount of bonds is not a donation to the railroad company, nor is the fact that the railroad does not touch the city and is not one of local interest, a defense in an action to compel the issuance of the bonds under the compromise.

COMPROMISE OF CLAIM AGAINST A CORPORATION.—A municipal corporation, if authorized to do so by law, may compromise a valid claim against it, and the valid claim is a consideration which will support the compromise.

COUNTERSIGNING BONDS OF SAN FRANCISCO TO CENTRAL PACIFIC RAILROAD COMPANY.—The Clerk of the City and County of San Francisco is not in default for not countersigning the bonds required to be issued by the Act of 1863, authorizing said city to subscribe to the capital stock of the Central Pacific Railroad of California, until the Board of Supervisors direct him to countersign the same or afford him an opportunity to do so in their presence, and he refuses.

APPLICATION FOR MANDAMUS A CIVIL ACTION.—A proceeding to procure a writ of mandate is a civil action, and the general rules of the Civil Practice Act are applicable to it.

JUDGMENT IN MANDAMUS.—If the relator, in proceedings to procure a writ of mandate, proceeds by petition and notice for a peremptory writ without procuring an alternative writ, the Court may grant any relief consistent with the case made by the petition and embraced within the issues, although it may be only part of that asked in the prayer of the petition.

THE Board of Supervisors of the City and County of San Francisco consisted of twelve members. The Board held a

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meeting, and by a majority vote passed the following resolution:

"*Resolved*, That the City and County Attorney be, and he hereby is requested to *represent* the Board of Supervisors and the members thereof in the proceedings lately instituted against said Board and Wm. Loewy, by the People of the State of California, upon the relation of the Central Pacific Railway of California, and other litigation upon the same subject, with a view to an early and definite determination of all the questions involved. And that G. W. Bell, F. N. Torrey and Henry L. King be and are hereby appointed a committee of this Board to confer with the City and County Attorney, with power, if they upon such conference think it best for the public interest, to employ assistant counsel; the compensation of such counsel to be hereafter fixed and determined by the Board."

In *French v. Teschemaker et als.*, 24 Cal. 518, and *The People v. Coon et als.*, 25 Cal. 635, will be found a full statement of any facts not contained in the opinion of the Court.

E. B. Crocker, for Relator.

The first question we propose to examine is that relating to the return made by the Supervisors, under the motion to strike out the answers of six of the Supervisors. Although no alternative writ of mandamus has been issued, yet the affidavit and notice under the statute occupies substantially the same position, and the affidavits in answer to the petition are properly subject to the same rules as a return to the alternative writ. The application differs materially from an ordinary action, as the *Supervisors* are the parties, and not the City and County of San Francisco, the corporation they represent. As Supervisors they are liable individually in this proceeding for *damages and costs*, (Practice Act, § 472,) which *they* must pay, and not the corporation they represent. The corporation of San Francisco has not refused to do the act required, but the Supervisors as individuals have, and are therefore liable.

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The proceeding is against an aggregate body, and the proper way for them to make a return is to meet together, and resolve by a majority vote what return shall be made. (Tapping, Mandamus, 384, 386,) [341].

In the absence of any return thus resolved upon, it is well settled that individual members dissenting from the return made, may file their separate returns, which will have force and effect according to the number thus dissenting. (Tapping, Mandamus, 384, 385, 386,) [341 to 344].

Apply these well settled rules to the present case. A paper purporting to be a return of the Board is drawn up, but never acted upon by them at any official or other meeting. It is sworn to by but one Supervisor, and thus it is virtually the return of but that one. Six of the Supervisors find that return to be false, and as they are liable to be mulcted in heavy damages and costs, file their returns, setting up the facts as they really are, as they have a perfect right to do, to protect themselves from personal liability.

Thus it follows that here are the returns of six members which admit the rights of the plaintiff, to one which deny them. If, however, the return made by McCoppin is to be treated as the return of himself and the other five members, who make no return, then it stands six affirming and six denying, and thus there is no issue raised. The allegations of the petition would stand undenied, and the plaintiff would be entitled to judgment. The Mayor might perhaps step in, and by siding with one or the other create a preponderance, but he has not done so.

It will be noticed that not a single allegation of fact in the petition is specially denied as required by section forty-six of the Practice Act. Every material allegation not "specifically controverted," is to be taken as true. (*Blankman v. Vallejo*, 15 Cal. 644; *Busenius v. Coffee*, 14 Cal. 93; *Anderson v. Parker*, 6 Cal. 200; *Swartz v. Hazlett*, 8 Cal. 126; *Dewey v. Bowman*, 8 Cal. 149.)

The only inquiry then is, does McCoppin's return *set up any new matter which shows that notwithstanding the truth of the facts stated in the petition*, the relator is not entitled to the writ?

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The first allegation, or rather series of allegations, are those charging fraud and corruption in bribing voters at the election in May, 1863.

These averments of alleged bribery should be disregarded for the reason *that the election cannot be attacked in this collateral proceeding.* The law regulating elections provides how the same shall be contested. Wood's Digest, page 380, section forty-six, requires the filing of a statement within forty days after the return day of the election. No such action having been taken in this case, the validity of that election cannot be contested in this proceeding. (*Satterlee v. San Francisco*, 23 Cal. 320, and the cases there cited.)

So, also, the validity of this election is *res judicata*. In the case of *French v. Teschemaker et al.*, in which the Board of Supervisors and the relator were parties, the validity of this election was one of the issues tried and adjudicated. The District Court found that the election was valid, and their judgment was affirmed by this Court, on appeal.

So, also, in the first mandamus brought by the relator against the Board of Supervisors to compel them to make the subscription and issue the bonds for six hundred thousand dollars, the Supervisors had an opportunity to raise the question of the validity of that election, but did not see proper to do so. The judgment in that proceeding is conclusive not only of the issues actually tried, but also of all questions which might have been put in issue, or which would have constituted a proper ground of defense. (2 Phillips' Ev.; C. H. and E.'s Notes, 29, 30; 1 Blackford, 360.)

The next reason given is that the compromise was obtained by fraudulent representations, and is therefore void and should not be enforced.

The alleged false representations are, that the officers of the company stated to the Board and the Mayor, immediately previous to the passage of the ordinance, that *if the proposed compromise was not made, the whole subscription of six hundred thousand dollars, with at least a year's back interest thereon,*

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would be immediately due and owing to the company from San Francisco.

It then avers that this representation was false, *because the Company had not at the time and have not up to this date called in or collected from individual subscribers the whole amount, or any large portion of their subscriptions to the capital stock.*

But all these averments are *uncertain and evasive*, as well as too general. The facts and circumstances are not stated, as they must be in cases where fraud is charged. (*Kinder v. Macy*, 7 Cal. 207.)

There are certain rules on this subject of misrepresentation it may be well to refer to. In the first place, the misrepresentation must be of something material, constituting an inducement or motive to the act of the other party, and by which he is actually misled to his injury. So it must be of something in regard to which the one party places a *known trust and confidence in the other*. *It must not be a mere matter of opinion, equally open to both parties for examination and inquiry, where neither party is presumed to trust to the other, but to rely on his own judgment.* So, if the representation be of such a nature that the other party *had no right to place reliance on it, and it was his own folly to give credence to it.* So, if a party does not choose to avail himself of the knowledge or means of knowledge open to him, he cannot be heard to say that he was deceived. It is his own folly not to use the knowledge within his reach. (1 Story's Eq. Jur., Secs. 195-201.)

The next reason given is that the claim to the bonds is founded upon a contract to deliver obligations which have more than one year to run, and therefore it is "an agreement that by its terms is not to be performed within one year from the making thereof," and must be in writing under the Statutes of Frauds. If the ordinance on which the rights of the company are founded can be termed an agreement, it is clear that it merely provides for the *immediate delivery of certain specified bonds, and as an agreement it is fully performed by the delivery of the bonds.* It is not, therefore, within the statute.

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Even if it was within the statute, the record of the ordinance, with the vote on its passage, and the signature of the Mayor approving it, constitutes a writing within the statute. But the Board of Supervisors in passing this ordinance exercised the legislative power vested in them by the laws. The ordinances of the city possess the character, force, and effect of laws. (*McCracken v. San Francisco*, 16 Cal. 591; *Holland v. San Francisco*, 7 Cal. 377; *Zottman v. San Francisco*, 20 Cal. 161.)

John H. Saunders, and John B. Felton, for Defendants.

The question, then, is distinctly presented to the consideration of this Court, whether the Legislature can impose on a municipal corporation of the State the burden of exclusively building or aiding to build a work of general interest to the State, which is in no sense a work of local interest to the corporation on which the burden is imposed.

In this State the question comes up for the first time before these evils have arisen. No bonds have been issued under circumstances like the present, for in every other case the railroad aided has passed through the county called upon to subscribe, or has had its terminus there, and so the subscription can be justified as a local improvement.

In the case of *Pattison v. Board of Supervisors of Yuba County*, 13 Cal. 188, the road aided by the county was purely a local road, and the validity of the subscription was placed upon that ground.

In the case of *Robinson v. Bidwell et als.*, 22 Cal. 380, the road assisted by public subscription terminated at Sacramento.

The question as to whether the Act was unconstitutional on this ground was not raised in the main argument, but, to use the language of the Court, was "suggested" in the petition for rehearing. Mr. Justice Norton, in his opinion, puts the constitutionality of the subscription on the ground that he could not say that a road directly communicating with the

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City of Sacramento, and passing through the county, was not a local work.

The leading New York cases go only to this extent, and while their reasoning justifies local taxation for local improvements, it also negatives the idea that a city or county can be exclusively taxed for an improvement which is in no sense a local one.

The leading case of *Bank of Rome v. The Village of Rome*, 18 N. Y. 32, was decided as late as September, A. D. 1858. The careful reasoning of the Court is remarkable. It says: "No Judge would, I think, venture to state a more restrictive rule than that the powers conferred on a municipal corporation must relate to the public interests of the territory or body of persons within its limits. Taking this definition, can a Court say that a railroad, *terminating at a village or city*, is so foreign to its public interests and those of its inhabitants, that it is beyond the legislative powers to authorize the village or city to become interested in its construction. The general judgment of men is, we all know, that a railroad, *so terminating*, does or at least may add to the value of property, promote trade, and contribute to the convenience of the inhabitants of the place."

The preceding case was decided on the authority of *Clarke v. Rochester*, 24 Barb. 474. But, in the latter case, the Court lays down the cardinal principle that a tax must be "general, and imposed on all, or all of a class of persons within prescribed limits or districts, upon some common principle or rule." (See page 481.)

Again: On page four hundred and eighty-two, the Court justifies these subscriptions on the sole ground that they are in aid of local improvements; and places its decision on the same ground on which it justifies the making and repairing of streets, that is, "upon the ground of benefit locally conferred."

Again: The Court, in resuming the points governing the case, (see page 489,) says, that works of internal improvement may be constructed by *general taxation*, and, in case of local works, by *local taxation*.

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The two leading cases in Illinois are the cases of *Johnson v. County of Stark*, 24 Ill. 89, and *Perkins v. Lewis*, 24 Ill. 208. In the former of these cases, the Court puts its decision on the ground that "the construction of a railroad through a county is a county purpose," and expressly declines to pass upon the question whether a railroad, not confined to or penetrating the limits of a county or city, is a local work. The latter decision goes upon the authority of the former. These cases were decided in 1860.

The answer sets up that there had never been any legal assessment laid upon any of the capital stock of the Central Pacific Railroad, and that no assessment is now due thereon. There consequently would have been no bonds due from the city to the company, even if the city had subscribed. It further sets up that the railroad company never had accepted the city's subscription under the Act of 1863.

Two consequences result from this: First—That the company had nothing that could be called a claim against the city for bonds under the Act of 1863. There was, therefore, nothing to compromise or settle. Second—That inasmuch as no bonds were due by the city to the company, the power to compromise had not vested in the Board of Supervisors. By the Act of 1864 the power to compromise does rest in said Board of Supervisors "only after and in case said Board of Supervisors shall be compelled by final judgment to execute and deliver the bonds under the Act of 1863."

(1.) The relation which the city assumes to the company under the Act of 1863, is that of *subscriber to its capital stock*. What are the *rights* of a subscriber to stock? Is he exposed to bear the full burdens of the company while the other subscribers are exempt? Can one subscriber be thus singled out as a packhorse for the rest?

(2.) Again: These bonds are to be received at par, dollar for dollar. (See Section 4, Act 1863, p. 381.)

What is meant by receiving them at par? Evidently, the meaning is that a dollar in bonds is equivalent to a dollar in cash from the other subscribers. But what mockery to speak

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of receiving them at par, if all of them are to be issued whether the other stockholders pay or not. We assume, then in arguing this point, that these bonds were in the nature of assessments, to be issued as regular assessments on the capital stock of the company when called in.

The claims, then, which the Act of 1864 authorized the compromise and settlement of, were claims for bonds to be issued as assessments on stock. When did these claims arise? It is clear that no claim arose from the Act of 1863, independent of subscription by the city and acceptance by the company. Until such subscription and acceptance the Act could be repealed. If the companies had a claim against the city, it is very clear that no legislative action could divest such claim. In the case of *Aspinwall et al. v. Commissioners*, 22 How. U. S. 376, the Court decided that a railroad company acquired no claim against a city by such an act; that it could be repealed, and that a subscription after such repeal and bonds issued was void. The same point was decided in *Covington and Lexington Railroad Company v. Kenton County Court*, 12 B. Monroe, 144. In *People ex rel. Peoria and Oquawka Railroad Company v. County of Tazewell et al.*, 22 Ill. 156, the Court say: "Until the city or county has subscribed there is no privity between the road and county or city."

There has, then, been as yet no acceptance of the terms of the Act of 1863, by the railroad company. It is not pretended that there has ever been any subscription by the city to the capital stock of this company, so that no contract has ever been made between the city and this company.

So far, then, we have these two proposition: First—That the Act of 1863 gives nothing which can be called a *claim* to the railroad company against the city. Second—That as yet no claim has arisen by contract; first, because the railroad company has never accepted the conditions of the Act of 1863; second, because as a matter of fact no contract has ever been made for subscription between the company and the city.

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If the Legislature, prior to this pretended compromise, had repealed the law of 1863, it would have found no vested claim of this company as an obstacle to its so doing. And this power of the Legislature to repeal the law is evidently the test of the existence of a claim; for if the claim exists, it cannot be affected by legislative action.

The alleged contract of compromise between the Board of Supervisors and the railroad company is void for want of consideration.

What does the company surrender as the consideration of such a contract? Evidently, nothing at all. It gives no stock, no obligation to build the road, no agreement to spend the bonds or any part thereof on the road. It simply says to the corporation: "I will release you from the public duty imposed upon you by statute of taxing the City of San Francisco, for a certain public purpose, for so much." But, clearly, no consideration moves from the company to the city, nor does the city receive any benefit from any source. True, it pays less money—but then it receives no public benefit. The private company can pay dividends with this money, and spend it as it chooses. Treating this compromise, then, as a contract, there is no consideration for it. The city receives nothing; the company gives nothing. (*Hampshire v. Franklin*, 16 Mass. 84; *Grogan v. The City of San Francisco*, 18 Cal. 590.)

No mandamus will lie to compel William Loewy to sign these bonds, because it is not a duty imposed upon him by his official position. The Clerk of the City and County of San Francisco is simply a County Clerk. His duties are defined by statute. (See Wood's Digest, Article 274, *et seq.*, p. 88.) Now his whole obligation to sign these bonds comes from the ordinance of the Board of Supervisors, and it is obvious that this Board, itself a Board of limited powers, has no authority to enlarge, change, or interfere with the duties imposed by statute on a wholly independent officer.

Some attempt to meet this was made on the argument by asserting that Loewy's obligation to sign these bonds comes

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from the statute of 1863. But it is so clear that that statute is only incorporated into this ordinance because the Supervisors selected the form and mode of executing these bonds there pointed out, and that they could just as well have selected any other mode of executing them, that we will not argue the question at length.

If the wrong person be made a party to a proceeding in mandamus, the whole proceeding must be superseded.

"If, therefore, the Mayor and *ex officio* President of the Board of Supervisors had been made a party to this proceeding the whole proceeding would have been superseded." And counsel cite *Rex v. Mayor of Hartford*, Salkeld, 701; *Rex v. Mayor of Ripon*, Salkeld, 433.

In support of this proposition, contended for on the other side, and conceded by us, we add the cases of *The People ex rel. Commissioners of Highways of Poughkeepsie and Fishkill v. The Board of Supervisors of the County of Dutchess*, 1 Hill, 50, and the case of *People ex rel. McSpedon v. The Board of Supervisors*, 10 Abbott Prac. R. 233.

John W. Dwinelle, and J. McM. Shafter, in reply.

The County Clerk can be compelled, by mandate, to countersign the bonds in question.

The office of County Clerk is created by the Constitution. (Article VI, § 7.) The only duties annexed to the office by the Constitution are those of Clerk of the District Court. (Ib. § 7.) All other duties are to be defined by law. (Ib. § 7.) It was competent, therefore, for the Legislature to throw upon the County Clerk the duty of countersigning the bonds of the city and county, by Laws of 1863.

Under the Civil Practice Act of California, the relator in this proceeding is entitled to any and all of the relief authorized by the case stated in the petition and affidavit.

"SECTION 147. The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case, the Court

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may grant him any relief consistent with the case made by the complaint, and embraced within the issue."

The return of the six Supervisors must be taken as the true return.

Boards of Supervisors are dealt with by law as an aggregate, and for this reason, service of process, in this and the like proceeding, is sufficient if made upon a majority, and the decision is binding upon their members, and upon their successors. (*People v. Contracting Board*, 20 How. Practice R. 206; *Maddox v. Graham*, 2 Metcalf, Ky. 156.)

The Board of Supervisors in *this* case are to act ministerially only, in execution of their own ordinance, which stands unrepealed, and unrepealable, having been accepted by the railroad.

Mandamus will be maintained against the council of a municipal corporation to compel the execution of a ministerial act, when it is evident that they are bound to perform it, and their conduct shows that they do not intend to do the act required. And this although there may be an action against the corporation for the delinquency, and such an action has been commenced and discontinued. (*Maddox v. Graham*, 2 Metcalf, Ky. 156.)

Where a party has no other adequate remedy, and his right is clear and undoubted, mandamus is not only the proper remedy, but is one of the most efficient proceedings known to the law for the enforcement of a right. (*People v. The Contracting Board*, 20 How. Pr. R. 206; *Commonwealth v. Pittsburgh*, 34 Penn. State Rep. 496.)

By the Court, RHODES, J.

Proceedings were commenced in this Court for a mandamus, to compel the Clerk of the City and County of San Francisco to countersign four hundred of the bonds of said city and county, and to compel the Board of Supervisors of said city and county to perform all the duties required on their part for

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the complete execution and delivery of the bonds to the Central Pacific Railroad Company, according to the provisions of the Acts of the Legislature of April 22, 1863, and April 4, 1864, and of the ordinance of said city and county, Number Five Hundred and Eighty-Two.

An answer, in form the answer of the Board of Supervisors, signed by the City and County Attorney and the assistant counsel, and verified by Frank McCoppin, one of the members of the Board of Supervisors, was filed in the case, and subsequent to the filing of this answer, six of the twelve Supervisors comprising the Board filed answers to the petition in their proper persons.

The counsel for the Board of Supervisors, upon the cause being called for hearing, filed their affidavit, stating that the answers of the six Supervisors were filed without the knowledge of said counsel, and that they had no information thereof until about twenty minutes before the meeting of the Court on that day; and they thereupon moved that those answers be stricken from the files of the Court. The counsel for the relator objected to the motion. It appears from the answer of the Board, that the Board, by resolution, requested the City and County Attorney to represent the Board and the members thereof in these proceedings, and authorized a committee of the Board to employ assistant counsel; and the counsel for the relator do not deny that Messrs. Saunders and Felton, the counsel who signed the answer of the Board, were duly authorized to appear for and represent the Board in the pending proceedings.

The answer of the six Supervisors, after the title of the cause, commences substantially in the following form: "For answer to the amended petition of the above named plaintiff, * * * one of the Supervisors of the City and County of San Francisco, and as such one of the defendants herein, for himself says that he is now and at the time of the commencement of this proceeding was one of the Supervisors of the City and County of San Francisco," etc.; and they do not purport to be the answer of the whole Board or of a majority of the

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Board, nor do the six Supervisors pretend to answer for the Board in its aggregate capacity. The Board of Supervisors, organized and acting as one body, in its corporate capacity is the defendant, and not the individual Supervisors who collectively make up the Board, "for this is not a proceeding against any individual until an attachment issues." (Spencer, J., in *People v. Champion*, 18 John. 60.) The answer of a Supervisor or of a number of Supervisors, in his or their own name or names, whether as Supervisors or otherwise, could with no more propriety be regarded as the answer of the Board, than could the answers of a number of citizens included within the municipality that elected the Board. The Supervisors constitute the Board, and possess the powers, and are capable of discharging the functions conferred by law upon the Board, only when they are assembled as a body, in the manner prescribed by law. Admitting that the members of the Board may severally answer, suppose that all make default except one, and he answering shows that the Board were not required to perform the alleged duty, could the writ issue either to the Board or to the members who made default? If it could issue, the Board or the members would be required to perform an act, that had been determined in the action, one of the members was not by law required to perform. If it could not issue, it would then appear that the answer of one member, traversing or confessing and avoiding the matters averred in the petition, was a sufficient defense to the whole proceeding, notwithstanding that the other members admitted every allegation in the petition. If one half of the members should make default and the other half should show good cause, still greater absurdities, if possible, would be manifest.

The answers of the six Supervisors, so far as they relate to the matters stated in the petition, amount to no more than would their default, for they do not deny nor confess and avoid any fact alleged in the petition; but it is attempted, by means of the answers, to raise issues between themselves and the Board, or the remaining members of the Board, respecting certain facts alleged in the answer of the Board. It is difficult to see how

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such issues could, under any rules of practice, be tried in this action, or how anything would result from the finding of the issues in their favor, as they do not demand any affirmative relief against either the Board or any of its members.

It is said in *Tapping on Mandamus* (p. 340) that the return to the writ should be made either by those to whom such writ is directed, or who are legally competent to execute it. There can be no question that the Board, and not any member or number of members, must execute the writ (if one should be issued) by the performance in its aggregate capacity, of the duty enjoined. The rules of the Civil Practice Act are as strictly applicable to the pleadings in mandamus as to those in any action, and under those rules no one may answer except those who are made, or are by the Court admitted as defendants. The remark found in the treatises on mandamus, that if two separate returns be made by different portions of the same corporation, the Court will take that which appears to be made by the majority, and other statements of similar import, do not mean that separate returns may be made by the several members of one "portion of the same corporation," as of one of the two boards composing the legislative branch of the municipal government, and that the Court may ascertain which return had the majority of the members; but in order to have any standing it must be made as the return of the whole corporation, or at least of a particular portion or branch of it, if the writ is directed to it, and then if two returns are made in that capacity, the Court will ascertain which is the true return; that is to say, the return of the majority. There might not be a majority to any return if made by individual members, for each member might make a separate return differing essentially from that of each of the other members.

The motion must be allowed, and the answers of the six Supervisors stricken from the files.

The relator moves for judgment on the pleadings; and in support of the motion it is insisted among other things that the answer filed by the counsel for the defendant is only the answer of Supervisor McCoppin, who verified it, and that if

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it is held to be either his answer or that of the Board, it does **not state facts sufficient to constitute** a defense to the action.

It is apparent upon inspection that it is not the answer of McCoppin, for its form is: "The Board of Supervisors do come, and for answer to the amended petition and affidavit, upon which the application of the above named plaintiff is made, allege and show," etc. The fact that it is verified by him has but slight, if any, tendency to show that it is his answer, and is entirely overcome by the fact that all the allegations are made in the name of the Board. If it can be regarded as a pleading in the cause, it must be held to be the answer of the Board of Supervisors.

The relator objects to the answer being considered as the answer of the Board, because it does not appear that the Board, as an aggregate body, resolved upon and made the return; or as we understand the objection, that the Board has not by resolution adopted the return, as prepared by their counsel, nor directed what matters should be set forth in their answer. It is not doubted, that the counsel who signed and filed the answer of the Board, were duly authorized to represent them, and such being the case, they were fully empowered to appear for them in the action, and do all those things that counsel might lawfully do in behalf of a person who was the sole defendant. In this respect they bear the same relation to the Board that they do to the Clerk of the City and County, and their authority is the same in either case, and similar presumptions will be indulged in, that the answer is the answer of the persons or body that it purports to be. No authority is cited, holding that it must be stated in the answer to the petition, or the return to the alternative writ, made by a corporation or a Board forming a constituent part of the corporate authority, that the corporation or Board had resolved upon the return or answer; and no reason suggests itself to our mind why such a statement should not be required in the petition, when a corporation is the relator, if it is necessary in the answer of the corporation. The general rules of pleading are substantially the same in mandamus as in other civil actions. (Tap. on

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Man.; 8 N. Y. 348; *Commercial Bank v. Canal Commissioners*, 10 Wend. 26; *People v. Ransom*, 2 Comst. 490.)

Among the numerous cases found in our reports of actions brought by or against corporations, none is noticed in which it is stated that the corporation had resolved upon the complaint or answer, or had, as a corporate act, directed what either should contain; and in examining many of the cases cited by Tapping on Mandamus, no such statement is found or said to be required in the return; but it would appear from those cases that it was neither usual nor necessary — the presumption being that it was the return of the officer or body it purported to be. In *Mayor of Thetford's Case*, 1 Salk. 192, which was mandamus to the Mayor and Common Council, the return was made in the name of the corporation, but without the common seal, or the hand of the Mayor set to it. After search of precedents, which were found both ways, the Court held the return good, because they were estopped by the record to say it is not their act; and the Court say that the City of London every year makes an attorney, by warrant, without either sealing or signing. In *Rex v. Mayor of Abingdon*, 2 Salk. 431, which was mandamus to the Mayor, Bailiffs and Burgesses, the Mayor made a return, and brought it in to file it, and it was objected to as the return of the Mayor and a minority; but Mr. Chief Justice Holt said: "It is not fit that we should examine upon affidavits whether there was the consent of the majority." (See also *Rex v. St. John's Coll.*, 4 Mod. 241.)

But it is said that there are, in effect, two returns, or answers, that in the name of the Board, and that composed of the answers of the six Supervisors; and that as the latter is inconsistent with the former, and is made by one half of the members, it must overrule the answer made in the name of the Board — at least that, taking all the answers together, they make such an inconsistent return, that they must be all disregarded. We have already said that the members of the Board are not parties to this action, and their answers as such members must be disregarded. The presumption is that the answer made and filed by the counsel for the Board in their name is

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the answer of the Board. "When a corporation aggregate, to which a writ is directed, has regularly resolved upon and made a return, individual dissentients cannot be allowed to dispute its propriety" (Tap. on Man. 341); but if the dissentients also file a return as the return of the corporation, the Court will ascertain which is the return of the majority; and doubtless without holding to the strict rule in 1 Salk. 192, that the members are estopped to say that the return is not the return of the majority, they may allege that the return is not the return of the majority, or has not been resolved upon by the corporation, and thereupon have the collateral issue determined by the Court. That, however, is not the case before us, but the dissentients merely undertake to controvert certain of the facts alleged in the answer of the Board, in avoidance of the facts stated in the petition.

The question then recurs, is the relator entitled to judgment on the pleadings, regarding the answer verified by McCoppin as the answer of the Board of Supervisors? The motion of the relator to that effect is equivalent to a demurrer to the answer, on the ground that it does not state facts sufficient to constitute a defense. Section thirty-seven of the Practice Act providing that "All the forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed in this Act" is applicable to proceedings in mandamus.

The principal facts upon which the right of the relator depends, briefly stated, are as follows: The Board of Supervisors had been commanded by the final judgment of this Court to subscribe six hundred thousand dollars to the stock of the Central Pacific Railroad Company, and to issue the bonds of the city and county in payment of such subscription, pursuant to the provisions of the Act of April 22, 1863; that afterward, under the provisions of the Act of April 4, 1864, the Board of Supervisors passed Ordinance Number Five Hundred and Eighty-Two, approved June 21, 1864, the terms of which were accepted by the relator, by which the parties compromised the claims of the railroad company upon the

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city and county, under the Act of 1863, it being agreed that the Board should in lieu of making the subscription and delivering the bonds to the amount of six hundred thousand dollars, deliver such bonds only to the amount of four hundred thousand dollars, without making any subscription to the stock, the bonds to be delivered to the relator, upon condition that they should be accepted in full discharge and satisfaction of all obligations, claims, etc., of the company against the city and county; that the company tendered to the city and county a full release and discharge of said obligations, claims, etc., to be delivered on the receipt of said bonds; that the Mayor, Auditor and Treasurer of said city and county, whose duty it was to prepare and sign said bonds, were in certain proceedings in this Court wherein they were the defendants and the company was the relator, ordered by a peremptory writ of mandamus, to execute and deliver without delay, to the company the four hundred bonds, of one thousand dollars each, as in said ordinance provided. It seems not to be doubted, and the decision in the last mentioned case (*People v. Coon, Mayor, et al.*, 26 Cal. 635) settles the point, that the four hundred bonds to be issued under Ordinance Number Five Hundred and Eighty-Two are parcel of the six hundred bonds provided for in the Act of 1863, they differing from the latter only in the date they were to bear.

In examining the answer somewhat in detail the only question will be whether it states facts sufficient to constitute a defense to the action, and many of the objections taken in the argument by the counsel for the relator, which might have been considered if made the grounds of a special demurrer, or of some proper motion to strike out, etc., must be disregarded.

The defendants' denial that they "became or were lawfully or duly or otherwise bound or obliged to subscribe six hundred thousand dollars, or any other sum to the capital stock" of the company, or to execute or deliver any bonds, is not the denial of any fact alleged in the petition. The judgment in the case of *The People ex rel. Central Pacific Railroad Company v. The Board of Supervisors, etc.*, whereby the defendants

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were commanded to subscribe to the stock not being denied stands admitted, and the denial that they were bound to obey the judgment, is only a denial of a conclusion or principle of law. (*People v. Commissioners of Fort Edward*, 11 How. Pr. 89.) If it is permitted to show collaterally that the judgment is void, the points of invalidity must be specified.

The remarks we have just made are applicable to the denial that they were "bound by law to execute or deliver" the four hundred bonds of the company, and the accompanying averment that Ordinance Number Five Hundred and Eighty-Two is "wholly illegal and void." The facts from which the Court might draw the inference that the ordinance was void, and not the assumed inference, should have been stated. The further allegation that neither the Board nor the Legislature have the right or power to make a donation to the company of four hundred thousand dollars of the money of the City and County of San Francisco, even assuming that it appeared that such a donation had been attempted, is rather a specification of a ground of demurrer, than an allegation of a fact.

The next averment of the answer is that the election in the City and County of San Francisco, held pursuant to the Act of April 22, 1863 — the Act authorizing the subscription to the stock of the company "was not fairly, or properly or legally conducted, but was affected, influenced and controlled by corruption and bribery" practised and perpetrated by the company and its agents and employés; and they specify nine instances, in which the alleged agent of the company employed the company's money, to corruptly influence the electors, to vote in favor of the proposition, to subscribe to the stock of the company. It will be seen on reading the Act of April 22, 1863, (Statutes 1863, p. 380,) that the Board could not be required, and were not permitted to subscribe to the capital stock of the company, unless a majority of those voting upon the proposition voted in favor of the subscription. It was absolutely essential, therefore, in instituting proceedings against the Board to compel the subscription to be made, that the relator should allege, and if it was denied by the Board, to

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prove on the trial, that a majority of the votes cast were in favor of the proposition. The fact must have been found by the Court or have been admitted by the pleadings—in other words the facts must have been alleged, and must have been true—for it was the fundamental fact in the action, and in its absence the Court could not have rendered the judgment that was pronounced, commanding the Board to make the subscription and issue the bonds. The matter thus became *res judicata*, and not subject to be again litigated in another action between the same parties. It is unnecessary to determine whether the alleged bribery and corruption could have been shown at the time the vote was canvassed, or in proceedings to contest the election, but if not admissible on either of those occasions, it would have been admissible in the proceedings against the Board to compel them to make the subscription, if they had alleged that the result at the election had been procured by those means. But now, in addition to the reason already given for excluding the alleged acts of bribery and corruption, they are immaterial and irrelevant, as they do not in any manner avoid the compromise, on which the relator proceeds in this action.

The allegations respecting the failure of the Board to procure an inspection of the books of the company, and to procure answers from the company to questions propounded to them, are so clearly immaterial that they require no notice.

They allege that the passage and approval of Ordinance Number Five Hundred and Eighty-Two were procured by the false and fraudulent representation of the company, that if the proposed compromise were not made the whole subscription of six hundred thousand dollars, with a year's interest, would be immediately due; but it is not stated that any fact was falsely and fraudulently stated, from which the inference might be drawn that the whole amount of bonds and interest was then due, and in the absence of an allegation that they were ignorant of the facts, upon the existence or occurrence of which the subscription became due, we must hold that the alleged representation was of a conclusion of law drawn from

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existing facts known to the defendants. Conceding the point contended for by the defendants, that the six hundred thousand dollars in bonds were payable in instalments, as assessments were called in from the stockholders generally, it yet is not alleged either that the company represented that assessments to the full amount had been levied, or that the Board were ignorant that they had not been so levied.

The defendants allege that Ordinance Number Five Hundred and Eighty-Two was never published and printed, as required by law; and by that which follows in the same paragraph we understand them to mean, not that the ordinance in the words in which it passed was not published, but that the several provisions of the law directly or indirectly referred to in the ordinance were not published with it. We do not understand that such a publication is required, but it was only necessary to publish the ordinance as passed—all persons being charged with notice of a public Act of the Legislature on which an ordinance is founded.

It is next alleged that the company did not accept said compromise after the passage of the ordinance, and did not comply with the conditions expressed in the ordinance. It is not stated wherein they failed to comply, and therefore that portion of the allegation is insufficient. They set out in the answer the resolution of the company accepting the terms of the ordinance, which had then passed to print, and say that they are advised that such resolution is not an acceptance of the terms of the compromise proposed in the ordinance. The objection amounts in substance to a demurrer to the resolution that it is not sufficient in law to amount to an assent on the part of the company to the terms of the compromise contained in the ordinance. It is not requisite that the assent to or acceptance of the terms of the compromise should have been made by the company after the ordinance had been approved by the Mayor. The company might by some proper corporate action have proposed the terms of the compromise, and the Board might thereupon have passed an ordinance, as they have done, and such acts would have con-

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stituted an assent by each party to the terms. The question as to how the contract must be proven is quite different from that which relates to the time of assenting to the terms proposed. It may be remarked that the commencing of this action, as well as the previous action against the Mayor, Auditor and Treasurer are very indicative of an acceptance by the company, even if it could be held that the acceptance of the terms by the company should have been subsequent to the approval of the ordinance.

The defendants say that the alleged contract, in order to be binding, must have been made in writing, and signed by the party to be charged. It requires no citation of authority to prove that a municipal corporation may contract by ordinance directly, and that a contract made in that manner as fully satisfies the Statute of Frauds as one made by the agents of the corporation who have been authorized to execute the contract. But they insist that the ordinance is not a contract; that it is but a resolution to do a certain thing—that is, to render to the company certain bonds; that the company resolved to receive bonds if all of them were tendered; and that when the bonds have been tendered by the city and received by the company, and the company have executed to the city a release, as provided for, then the parties will have made an executed contract; but as yet there is no contract between the parties, the ordinance of the city and the resolution of the company amounting to nothing more than declarations of intention to enter into an executed contract. This certainly was not the view of the Court in *The People v. Coon et al.*, nor do we think the position tenable. True, the company say, after accepting the proposal contained in the ordinance, that such acceptance shall be effectual only when the whole of the bonds shall have been delivered to them; but, taking the whole transactions of the parties together, it is manifest that the parties entered into a contract of compromise, but that the company would not yield their rights, or discharge their claims, under the Act of 1863, until the city had complied with the terms of the compromise contract. The parties did

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not contemplate a further contract, but the company, in assenting to the contract, insisted on a performance of its terms by the city, before the company would release the city from the obligations cast on her by the Act of 1863.

The defendants further say that the company have not, by any corporate act, consented to be bound by the provisions of the Act of 1863, nor agreed to receive the bonds mentioned in the Act. Such consent of the company was not required by the Act of 1864 to be the basis of the compromise, but it was only requisite that this Court should have commanded the Board to execute and deliver the bonds. The commencing of the proceedings by the company against the Board was sufficient evidence, in that cause, of the acceptance by the company of all the terms of the Act, and the judgment having been rendered compelling the Board to make the subscription and issue the bonds, the inquiry now whether the company had in fact agreed to receive the bonds which they, in that proceeding, demanded should be issued to them, is immaterial.

The denial in general terms that they became bound to execute and deliver the bonds to the amount of six hundred thousand dollars, or that they have ever been compelled by the judgment of this Court to execute or deliver the bonds, forms no answer to the allegation in the petition that a judgment of this Court was rendered by which they were commanded, by the peremptory mandate of the Court to execute and deliver the bonds, as no fact is alleged tending to invalidate the judgment. We have sufficiently indicated our opinion that a denial of this character is not a denial of a fact, but of a conclusion of law, and would be more properly classed among the grounds of demurrer than the allegations of the answer.

The question arising upon the facts alleged by the defendants that the company's road does not have a terminus at San Francisco, nor at any point nearer than the City of Sacramento, that the work is one of general interest to the whole State, but not of local interest to San Francisco, and that the city has subscribed to the stock of the San Francisco and San José Railroad, which has a terminus at San Francisco,

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etc., have been discussed by counsel with great ability, but the great length of the opinion will preclude us from considering them in detail. They are resolvable into the question whether the Legislature can impose upon a municipal corporation the burden of building or aiding in building a work which is in no sense a work of local interest to the corporation, but which is of general interest to the people of the State. The counsel for the defendants deny the power to the Legislature, and say that the facts alleged by the Board show that the railroad is not of local interest to the city. By the provisions of the Act of 1863, the city was required to become a subscriber, to a certain amount, to the capital stock of the railroad company, in the event that, at the election provided for in the Act, a majority of the electors of the city, voting on the proposition to subscribe, should cast their votes in favor of the proposition. The majority of the votes having been cast in favor of the proposition to subscribe, it became the duty of the Board of Supervisors to make a subscription to the amount of six hundred thousand dollars, whereupon the city would become a stockholder in the corporation, with all the rights of other stockholders, and subject to all the liabilities of other stockholders, except certain ones, from which she was exempted by the provisions of the Act, and having the right to pay her subscriptions in her bonds instead of money. Upon the subscription being made, and the bonds, or an instalment of them equal to the assessments upon other stockholders, being delivered to the company it could not be said that the city had made a donation to the company, or had been charged with the expenses of a work which was being constructed for the benefit of the public, in any other sense than the same could be said of any stockholder in the company, but she would be a stockholder in a work which was being prosecuted for the benefit of all the stockholders in the company. True, the work might not result in profit, but that is a risk incident to all enterprises of the kind. It became the duty of the city to subscribe to the stock, and to deliver her bonds to the company, and she was commanded so to do by the Court; and the

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company having accepted the terms of the proposed subscription, a claim accrued to the company against the city, that she should make the subscription and deliver the bonds, and thereby assume such liabilities as a stockholder, as were required of or cast upon her by law. But the city not wishing to become a stockholder and assume the liabilities incident to that relation, enters into a compromise with the company, under the authority of the Act of 1864, by which it is agreed that the city shall not subscribe nor deliver the stipulated amount of bonds, nor incur the liabilities of a stockholder, and that in satisfaction of the claim of the company against her, she shall deliver to the company a certain less amount of her bonds. The bonds are the price she pays in extinguishment of the company's claim against her; and the transaction cannot be regarded as a donation in any other sense than as any compromise may be, nor as a burden imposed on her to aid in the construction of a public work. The facts, therefore, that the work is not one of local interest to the city, and that she has already subscribed to a railroad that is of local interest to her, are immaterial and constitute no defense to the action.

The remaining allegations of the answer have been disposed of in considering other points in the case, but it may be added that in our view it makes no difference as to the validity of the compromise, whether the bonds were payable in instalments or in gross, nor whether a legal assessment had been laid on the capital stock of the company, for irrespective of the time when the bonds under the Act of 1863 might become due, the company held a claim against the city, which was a proper subject of, and formed a good consideration for, a compromise.

The answer of the Clerk of the City and County remains to be considered. It is provided in section five of the Act of 1863, authorizing the subscription of the city to the stock of the company, that upon the bonds being signed by the Pacific Railroad Loan Commissioners, they "shall be presented by the President of the Board of Supervisors to the Clerk of said city and county, who shall countersign the same as such Clerk,

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in the presence of a quorum of such Board, at a meeting thereof," etc.; and it is provided by Ordinance Number Five Hundred and Eighty-Two that the bonds thereby required to be issued should be executed in all respects, except as to date, as required by the Act of 1863. The relator alleges in his petition that when the bonds had been signed by the Pacific Railroad Commissioners they were, by the President of the Board, at a meeting of the Board, in the presence of a quorum thereof, on the 7th day of September, 1864, presented to the Clerk for the purpose of being countersigned by him, in the presence of a quorum of the Board, but that he did not countersign the same; and that on the 27th day of September the relator notified him that there would be a meeting of the Board on the evening of that day, and requested him to attend and complete the countersigning of the bonds, but that the Clerk did not present himself and countersign or offer to countersign any of the bonds. The relator shows that at the meeting on the 27th of September the Clerk was not requested by the Board to countersign the bonds, and had no opportunity so to do; but, on the contrary, that the Board refused to adopt a resolution requesting the Clerk to countersign the bonds, and, by resolution, directed him to deposit them with the County Treasurer, subject to the order of the Board, which was immediately done.

The Clerk denies that on the 7th of September, or at any other time or meeting of the Board, he had an opportunity to countersign the bonds, or that he was ever authorized to countersign them; and he denies that he has authority so to do without the request of the Board. The bonds, from the first step in their preparation up to their delivery to the company, are under the control of the Board, and everything relating to their execution is done under the direction of the Board. The Clerk of the City and County, in proceeding to countersign them, is as completely subject to their orders, as the Clerk of the Board is, in entering in their journal the fact of countersigning, and the number, date and amount of the bonds. It will not be contended that the Clerk could have proceeded

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to countersign the bonds after the Board directed him to deposit them with the Treasurer, and it is equally clear that he had no authority to proceed, unless the Board directed him to do so, or afforded him an opportunity to proceed with the countersigning in their presence. His denial raises a material issue of fact, for if his answer is true in that respect, and the motion admits it to be true, he is not in default in the performance of the duties imposed upon him by the Act, and continued by the ordinance.

Our conclusion is that the answer of the Board does not state facts sufficient to constitute a defense; and that the answer of the Clerk sets up a valid defense to the action.

The point presented by the defendants that as the relator is not entitled to all the relief he claims, the peremptory writ must be denied, may be passed upon now, though strictly speaking, the issues of fact raised by the answer of the Clerk should be first disposed of upon the evidence that may be introduced by the parties, but the action, so far as the Clerk is concerned, cannot be disposed of under this motion, on the ground of a misjoinder of parties defendant or of causes of action, as those objections should have been taken by demurrer, for if they exist they are apparent upon the face of the petition. The defendant cites two cases: *The People v. The Board, etc., of Dutchess*, 1 Hill, 50, and *The People v. The Board, etc.*, 10 Abbott's Pr. 233, to sustain the proposition "that if the relator is not entitled to what he demands in the alternative writ, his motion for a peremptory writ should be denied, though it appear that he is entitled to a portion of the relief." The doctrine of those cases is that the peremptory writ should follow the alternative writ, and that if the alternative writ demands too much — something more than the relator is entitled to — the judgment must be for the defendant; for there cannot be a judgment for the relator for a part of the relief demanded in the writ and for the defendant for the other part. To the same effect also is *Tappan on Mandamus*, 402, 403. Without commenting upon the distinctions that might be found between such a case, when the question is: Shall the alterna-

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tive writ be made peremptory? and a case in which the proceeding is by petition and motion for a peremptory writ, when the Court would doubtless have the right to frame the writ according to the exigencies of the case; we think the point may be solved on other principles. A proceeding to procure the issuing of a writ of mandamus is a civil action. In *Kendall v. United States*, 12 Peters, 615, the Court say: "It is an action or suit brought in a Court of justice, asserting a right, and is prosecuted according to the forms of judicial proceedings." (See *People v. Ransom*, 2 Comst. 490; *Commercial Bank v. Canal Commissioners*, 10 Wend. 26; *Tyler v. Houghton*, 25 Cal. 26.) The final determination of the Court in the matter is a judgment, and if rendered in any Court but the Supreme Court an appeal lies from the judgment. The parties appear, and by their pleadings form issues, and if of fact they may be tried by a jury, and new trials may be had. The relator may in the same action recover the damages he may have sustained, and execution may issue for the damages and costs. In *People v. Croton Aqueduct Board*, 5 Abbott's Pr. 372, it is held that the rules of the code of New York do not apply to mandamus, because Sec. 471 expressly excludes from their operation that class of cases. There is no such reservation in our Practice Act, and in our opinion the general rules of that Act are applicable to mandamus, in the same manner as to an action for an injunction or of *quo warranto*; and whatever may be the rule when the relator, after having procured the alternative writ, moves for the peremptory writ, we have no doubt that, when the relator proceeds by petition and notice for the peremptory writ, without procuring an alternative writ, the Court, under the enlarged discretion conferred by Sec. 147, may grant any relief consistent with the case made by the petition, and embraced within the issues, although it may be only a part of that demanded in the prayer of the petition.

We have omitted to comment on many of the cases cited by the respective counsel, for the obvious reason that the attempt to do so, in a case brought before this Court, as a

Opinion of Sawyer, J., and Shafter, J., concurring specially.

Court of original jurisdiction, in which all the numerous points are presented that suggest themselves to the minds of able and ingenious counsel, as is usual at *nisi prius* trials, would involve very great labor, without any corresponding benefit.

The relator is entitled to judgment for a peremptory mandamus on the pleadings against the Board of Supervisors, but not against the Clerk of the City and County, and as to him the proceeding must be dismissed.

SAWYER, J., and SHAFTER, J., concurring specially.

We are not prepared to say that the individual answers of the six Supervisors, alleging a willingness to perform the duties sought to be enforced, ought to be struck out. But disregarding them, and conceding the answer verified by McCoppin to be the answer of the Board, we are satisfied that said answer does not "raise a question as to a matter of fact essential to the determination of the motion;" and that complainants are entitled to a peremptory mandamus against the Board of Supervisors, as prayed for in the petition.

Loewy, the County Clerk, substantially denies that he had an opportunity to countersign the bonds, and the inference from his answer is that he is ready to countersign when a proper opportunity is given. We think his answer raises a material issue as to him; but we do not understand that the relators propose to put in any evidence on that issue; and taking the answer as true, Loewy is not in default. The proceeding must, therefore, be dismissed as to Loewy, and a peremptory writ of mandamus issued against the Board of Supervisors.

HENRY LEVY v. HENRY GETLESON AND ERNEST PESTNER.

SETTLEMENT OF STATEMENT AND AMENDMENTS THERETO.—The Court should not settle a statement made in support of a motion to set aside a nonsuit which does not specify the errors upon which the moving party will rely, nor

Statement of Facts.

should it entertain a motion to amend the same after it has been filed and served on the opposite party.

SAME.—Such statement should, on motion of the opposite party, be stricken from the files of the Court.

STATEMENT ON APPEAL.—A statement which does not purport to be a statement on appeal, cannot be considered on an appeal from the judgment.

REVIEW OF ORDER GRANTING NONSUIT.—The District Court cannot review an order granting a nonsuit upon a motion to set aside the nonsuit.

APPEAL FROM ORDER REFUSING TO RETAX COSTS.—An appeal cannot be taken from an order denying a motion to retax costs made before final judgment.

SAME.—An order denying a motion to retax costs should be reviewed by an appeal from the judgment, and annexing a statement to the judgment roll.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

This was an action on a promissory note alleged to have been executed by the defendants as copartners, under the name of H. Getleson & Pestner. Defendant Getleson made default; defendant Pestner answered, denying his liability on the note.

The case was tried October 16, 1863, before a jury, and after the close of the testimony the Court, on motion of the attorney for defendant Pestner, granted a nonsuit as to him, with leave to plaintiff to move to set aside the nonsuit, and directed the jury to find a verdict for plaintiff against defendant Getleson. October 19th, plaintiff's attorney filed and served on defendant Pestner's attorney, the following notice:

"Please take notice, that the plaintiff intends to move the Court to set aside the judgment of nonsuit herein, and for a judgment against both of the defendants, and that the proposed statement of the case, upon which said motion will be made, is herewith served upon you."

Plaintiff's attorney, on the same day, filed and served a statement embodying the evidence and rulings of the Court, with his exceptions thereto. This statement, after the title of the case, was headed:

"Statement of case on motion to set aside nonsuit in favor of defendant Pestner, and on motion for judgment upon the pleadings and proof, against both defendants."

Argument for Appellant.

The statement did not contain a specification of the errors upon which plaintiff would rely. On the 28th of October plaintiff's attorney served on the attorney for Pestner a specification of the grounds upon which he would rely on his motion to vacate the judgment of nonsuit, but the latter returned it. Plaintiff then moved the Court to be allowed to amend his statement by inserting the specification of grounds upon which he would rely, but the Court denied the same May 2, 1864. June 29, 1864, on motion of the attorney for defendant Pestner, an order was made striking the statement from the files of the Court. July 2d plaintiff's attorney moved the Court to sign the statement as the settled statement of the case, which was denied July 11th:

The other facts are stated in the opinion of the Court.

Wm. W. Chipman, for Appellant.

In a case of this kind, no specification of grounds is necessary. None are contemplated nor provided for in the statute. A motion to set aside a nonsuit, and for judgment *non obstante veredicto*, may, I conceive, be made without asking for a new trial, and such a motion may be granted without a new trial.

The Court ought to have allowed an amendment of the statement, if an amendment be deemed necessary; and the order denying the motion is not discretionary merely. It is a matter of right, and is appealable. It is an order subsequent to judgment, and authorized by statute to be reviewed by appellate Court. Transcripts have been sent back to lower Court to allow statements to be amended, restated, and reformed. (*Powell v. Waters*, 8 Cow. 55; *Codwise v. Hecker*, 1 Cain, 74; *Smith v. Grant*, 7 How. Pr. 381; *Westcott v. Thompson*, 16 N. Y. 613; *Johnson v. Whitlock*, 3 Kernan, 344; *Tillotson v. Cheatham*, 3 Johns. 95; and see *Loucks v. Edmondson*, 18 Cal. 203, citing *Valentine v. Stewart*, 15 Cal. 396; *Howe v. Briggs*, 17 Cal. 385; *Branger v. Chevallier*, 9 Cal. 351.)

W. P. C. Whitney, for Respondent.

Opinion of the Court.

By the Court, SHAFER, J.

One of the questions presented is whether it is error for a District Court to refuse to settle a "statement" made in support of a motion to set aside a nonsuit—or to refuse to entertain a motion to amend such statement after it has been filed and served on the opposite party—or error to grant an order striking such statement from the files of the Court.

The District Courts cannot be called upon to review a case upon the testimony, nor upon an allegation of errors of law occurring at the trial, except in the way pointed out in the Practice Act. That method is simple and straightforward, and, in our judgment, was intended to exclude all others. If the plaintiff desired to have the nonsuit entered against him investigated upon its merits in the District Court, he should have moved for a new trial upon a statement; or if he preferred to bring the case to this Court directly, he could have done so by an appeal from the judgment aided by a statement annexed to the roll. There is a statement in the transcript but it does not purport to be a statement on appeal from the judgment. The result is that the Court did not err in refusing its sanction to a method of reviewing decisions made in the course of a trial, altogether unknown to our system.

The plaintiff has not only appealed from the judgment in favor of Pestner, but also from an order overruling a motion to retax the costs. The memorandum of costs was duly filed October 17, 1863; the notice of motion to retax was served June 20, 1864, and the order denying the motion was made on the twenty-seventh of that month. The judgment was entered July 18, 1864. The order appealed from is not in itself appealable, inasmuch as it was not made after final judgment. The proper course would have been to appeal from the judgment—raising the question of the correctness of the taxation by a statement annexed to the judgment roll. (Practice Act, Sec. 344.) We cannot approach the alleged error through an appeal from a non-appealable order.

Judgment affirmed.

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3. RIGHT OF ONE OR TWO MORTGAGEES OF PERSONAL PROPERTY.—If a mortgage on personal property is made to two persons, to secure the separate debt of each, either mortgagee, after condition broken, may advertise and sell at public auction the undivided interest which he holds in the property as security for his debt, and the purchaser will become a tenant in common with the owner of the unsold portion. *Id*.
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5. MORTGAGEE OF PERSONAL PROPERTY HAS TWO REMEDIES.—The mortgagee of personal property has two remedies, either of which he may pursue at his election. He may resort to a Court of equity to foreclose the mortgagor's right to redeem, or to compel a redemption, or he may obtain the same object by a fair public sale of property after due notice to the mortgagor. *Id*.
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3. **TIME OF PUBLICATION OF NOTICE.**—If the Act authorizing proceedings for the condemnation of land directs a notice to claimants to be published for four weeks, and only twenty-four days elapse from the day of the first publication to the day the defendants are notified to appear, the Court acquires no jurisdiction over parties who do not voluntarily appear in the action. *Id.*
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CRIMINAL CASES.

1. **WANT OF JURISDICTION APPEARING ON TRIAL.**—When it becomes manifest in the course of the trial of a person indicted as an accessory, that the offense of the accessory was committed in another county than that where the indictment was found, the Court should, on its own motion, discharge the jury and commit the accused to await a warrant from the proper county. *People v. Hodges*, 340.
2. **ARREST OF JUDGMENT IN CASE OF ACCESSORY.**—If the evidence shows that the offense of the accessory was not committed in the county where the indictment was found, the Court should arrest the judgment without a motion to that effect being made. *Id.*
3. **DISCHARGE OF JURY IN CRIMINAL CASE.**—If, after the jury in a criminal case have retired to deliberate on their verdict, the Court directs the Sheriff to discharge them if they do not agree on their verdict by a certain hour, and then adjourns, and at the hour named the Sheriff discharges the jury, this will not operate as an acquittal of the defendant, but another trial may be had. *People v. Shotwell*, 397.
4. **SENTENCE WHERE INDICTMENT CHARGES TWO OFFENSES.**—If the indictment contains more than one count, each charging a distinct offense, and the verdict is general, finding the defendant guilty, the presumption will be that the Judge who tried the case pronounced judgment for the offense to which the evidence was directed and was properly applicable. *Id.* 400.
5. **BURDEN OF PROVING HOW STOLEN PROPERTY WAS OBTAINED.**—The burden of proving that stolen property found in his possession came honestly into his hands is not cast upon a defendant in a criminal case, unless the prosecution has introduced evidence, either direct or presumptive, sufficient to prove that he came dishonestly by it. *People v. Antonio*, 404.
6. **GENERAL OR SPECIAL VERDICT IN CRIMINAL CASES.**—The Court cannot direct a jury, in a trial for larceny, to render a special verdict, but, upon

- the request of either party, it should instruct them that they have the discretion to render either a general or special verdict. *Id.*
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 8. **IMPLIED BIAS OF JUROR.**—In order to render a juror called in a criminal case incompetent on the ground of implied bias, it must appear that he entertains a fixed and settled conviction of the guilt or innocence of the defendant, or that he has expressed such conviction. *Id.*
 9. **CHARGE OF JUDGE ON EVIDENCE.**—If on a trial for murder there is no evidence of facts and circumstances such as would, under the law, reduce the crime charged to manslaughter, the Judge may so inform the jury, and may charge them that they cannot consider the question of manslaughter. *Id.*
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 11. **ACT OF ONE CONSPIRATOR THE ACT OF ALL.**—If several persons conspire together to commit a robbery, and to resist arrest even to the taking of life, and after the robbery is committed take the life of an officer in resisting an arrest, whatever is said or done by any one of them in furtherance of the common design is a part of the *res gestæ*, and the act of all. *People v. Pool*, 576.
 12. **NOTICE BY AN OFFICER OF HIS OFFICIAL CHARACTER.**—Where a party is apprehended in the commission of an offense, or upon fresh pursuit afterwards, notice of the official character of the person attempting to make the arrest, or of the cause of the arrest, is not necessary. *Id.*
 13. **ARREST WITHOUT A WARRANT.**—A peace officer may, without a warrant, arrest a person for a felony he has committed—though not committed in the officer's presence—when the criminal is fleeing from the scene of the crime. *Id.*
 14. **SAME.**—The words "when he is pursued immediately after an escape" in the one hundred and thirty-seventh section of the Practice act, are not used in the sense of an escape from custody, but in the sense of flight from the scene of the crime; and the words "immediate pursuit," are the same as "fresh pursuit" used in common law phrase in criminal cases. *Id.*
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See POSSESSION, 1; HOMICIDE, 1, 2; INDICTMENT; CONSTITUTIONAL LAW, 7; ROBBERY, 1; MURDER, 2.

CRIMINAL PRACTICE.

1. **PRESENTMENT OF INDICTMENT.**—It will be presumed that an indictment was presented to the Court by the Foreman of the Grand Jury, and in their presence, although that fact is not indorsed on it, if the record of the Court shows nothing to the contrary. *People v. Blackwell*, 67.
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3. **WHEN SEVERAL DISTINCT OFFENSES MAY CONSTITUTE A SINGLE CRIME.**—A person guilty of forging a check, and also of an attempt to pass it, or of passing it as true and genuine with intent to damage and defraud another person, may be indicted, tried, and convicted for all these connected and consecutive acts as constituting one transaction and one crime; or if guilty of but one of such acts, he may be indicted, tried, and convicted for its commission as constituting a distinct crime. *People v. Shotwell*, 400.
4. **HOW OBJECTION TO INDICTMENT TO BE TAKEN.**—If there is more than one offense charged in the indictment, the defect should be taken advantage of by demurrer. If the objection be not taken by demurrer, it cannot be considered on motion in arrest of judgment. *Id.*
5. **ELECTION AS TO COUNT ON WHICH ACCUSED SHALL BE TRIED.**—If the indictment contains more than one count, each charging a distinct offense, the Court is not required to compel the prosecutor to elect upon which count of the indictment he will try the accused. *Id.*

See COUNTY COURT, 1; DISTRICT ATTORNEY, 1; EVIDENCE, 2; NEW TRIAL, 15.

CRIMES AND PUNISHMENTS.

1. **DISTINCTION BETWEEN ACCESSORY AND PRINCIPAL.**—A person who incites, counsels, hires, or commands another to commit a crime, but is not within such convenient distance as to be able to come to the immediate assistance of his associates, if required, or to watch to prevent surprise, is an accessory, and not a principal in the second degree. *People v. Hodges*, 340.
2. **ACT CONCERNING INDIANS.**—The Act of April 22d, 1850, for the protection and punishment of Indians, was intended to be applied to Indians in tribes, or when living in separate communities or companies, and not to a case where an Indian has been living among white men. *People v. Antonio*, 404.
3. **REPEAL OF ACT PRESCRIBING WHIPPING FOR LARCENY.**—The Act of April 22d, 1850, conferring on Justices of the Peace the power to punish Indians convicted of larceny by whipping, is repealed by the Act of 1856, which prescribes the punishment for both grand and petit larceny. *Id.*
4. **JUSTICE'S JURISDICTION TO TRY INDIAN FOR GRAND LARCENY.**—The Act of April 20th, 1863, concerning Courts of justice in this State, takes away from Justices of the Peace the power to try and punish Indians for grand larceny conferred upon them by the Act of April 22d, 1850, for the protection and punishment of Indians. *Id.*
5. **ENTERING HOUSE WITH INTENT TO STEAL.**—The mere fact that one person is with another who enters a dwelling house and steals therefrom, and sees him steal without interference on his part to prevent it, does not render him guilty of the crime of maliciously entering a dwelling house in the daytime with intent to steal property therein, nor will the proof of such facts cast on him the burden of proving himself innocent. *People v. Ah Ping*, 489.

See HOMICIDE, 1, 2.

CONDUCT OF JUDGE.

1. **CONDUCT OF A JUDGE DURING A TRIAL.**—If the character of a witness is called in question during a trial, and the Judge makes a remark from the bench

indorsing his respectability, it is good cause for a reversal of judgment, if the testimony of the witness is material. *McMinn v. Whelon*, 819.

CONFESSION OF JUDGMENT.

See FRAUDULENT JUDGMENT, 1, 2, 3, 4, 5; JUDGMENT, 9.

CONSTITUTION.

See CONSTITUTIONAL LAW, 1, 2, 3, 4, 5, 6.

CONSTITUTIONAL LAW.

1. **POWER OF THE LEGISLATURE OVER TAXATION AND APPROPRIATIONS.**—By the Constitution of California, the legislative department of the Government is vested with the power of taxation, and the authority to determine the objects for which the taxing power shall be exercised, and to appropriate the moneys thus raised to such objects; and there is no restriction upon this power as to the objects to which, or the time for which appropriations may be made, except that "no appropriations for a standing army shall be for a longer time than two years." *People v. Pacheco*, 209.
2. **APPROPRIATIONS — WHEN DO NOT CREATE STATE DEBT.**—There being no limitation in the Constitution in respect to the time over which legislative appropriations may extend, a law which appropriates a sum or sums of money for the future, and directs certain payments to be made out of the same at designated periods, from year to year thereafter, and which also imposes a special tax and sets apart the proceeds thereof to constitute a fund sufficient to meet the sums so appropriated and directed to be paid, as the same become payable, does not create a debt within the meaning of the prohibitory clause of Article VIII of the Constitution of the State of California. *Id.*
3. **CREATION OF STATE DEBT IN CASE OF WAR.**—The legislative department of the State Government has the exclusive right to determine when such a state of war exists as will authorize it to create a debt to repel invasion or suppress insurrection, without submitting the law creating the debt to the people; and its determination upon this subject is not subject to review, or liable to be controlled by the judicial department. *Id.* 221.
4. **LEGISLATIVE DETERMINATION WHEN WAR EXISTS.**—The passage by the Legislature of an Act creating a debt for the purpose of repelling invasion or suppressing a rebellion, without a submission of the question to a vote of the people, which Act recites in its preamble the existence of war, and refers in the body of the Act to such recital for the reasons which operated upon that body to induce the passage of the Act, is evidence of a determination by the Legislature that the exigency justifying its action in creating the debt has arisen. *Id.*
5. **AID TO A RAILROAD CORPORATION BY THE STATE.**—Section ten of Article XI of the Constitution, prohibiting the State from giving or loaning its credit to or in aid of a corporation, does not prohibit the State from appropriating its funds, in time of war, to aid a corporation in the construction of a railroad to be used by the State for military purposes. *Id.* 225.
6. **GIFT OR LOAN OF THE CREDIT OF THE STATE TO A CORPORATION.**—The imposition of a special tax, and an appropriation of the proceeds of the same to be paid, when collected, to a railroad company, or its creditors, to aid in building the railroad, in consideration of valuable services to be rendered thereafter to the State by the corporation, is not a gift or loan of the credit

of the State to or in aid of a corporation, within the meaning of section ten of Article XI of the Constitution. *Id.*

7. CHARGE OF JUDGE ON WEIGHT OF EVIDENCE.—Under our Constitution the Judge, in his charge to the jury, cannot express his opinion upon the weight of evidence. He may, however, state the evidence to the jury, and declare the law resulting from the facts proven, and when there is no evidence as to a particular fact or issue, he may so state to the jury. *People v. King*, 509.

CONTEMPT.

1. VIOLATION OF AN INJUNCTION.—The District Court alone has jurisdiction to try and punish for a contempt for the violation of an injunction issued out of the District Court. *People v. County Judge of Placer County*, 151.

CONTRACT.

1. A CONTRACT ASSIGNABLE.—A contract where the owner of a stallion leases him for a season for a sum of money agreed on, and reserves the right to have the horse cover nine mares during the season, is assignable, and the assignee, who is also the purchaser of the horse from the owner, is entitled to all the benefits arising out of the contract. *Doll v. Anderson*, 250.
2. SAME.—Before the assignee of such contract is entitled to the benefit of the same he must give notice to the lessee that he has purchased the same. *Id.*

See EVIDENCE, 21; ANSWER, 2; MUNICIPAL CORPORATION, 11, 12.

CONSOLIDATION OF ACTIONS.

1. CONSOLIDATION OF SUITS.—The Supreme Court will not consolidate suits brought upon distinct causes of action. *Wallace v. Eldridge*, (No. 2,) 498.

CONTRACTS.

1. JUDGMENT A CONTRACT.—A judgment is a contract in the highest sense of the term, and the word "contract" as used in the amendment to the Civil Practice Act providing for the rendition of judgment payable in the kind of money specified in the contract, includes judgments. *Wallace v. Eldridge*, (No. 2,) 498.

See JUDGMENT, 7; EQUITY, 1, 2.

CONVEYANCE.

1. PROOF OF RELEASE OF EQUITABLE ESTATE IN LAND.—A release of an equitable estate in land can only be proved by a deed of conveyance, in writing, subscribed by the party granting the same, or by his lawful agent thereunto authorized by writing. *Millard v. Hathaway*, 139.

See LAND, 1, 2, 3; TENANTS IN COMMON, 1.

COMMON CARRIERS.

1. COMMON CARRIERS AND FORWARDERS.—The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different. *Hooper v. Wells, Fargo & Co.*, 26.
2. LIABILITY OF COMMON CARRIERS.—The common carrier who undertakes to carry goods for hire is an insurer of the property intrusted to him, and is legally responsible for acts against which he cannot provide, from whatever cause arising; the acts of God and the public enemy alone excepted. *Id.*
3. LIABILITY OF FORWARDERS.—Forwarders are not insurers, but they are re-

- sponsible for all injuries to property, while in their charge, resulting from negligence or misfeasance of themselves, their agents or employes. *Id.*
4. **RESTRICTIONS ON COMMON LAW LIABILITY OF COMMON CARRIER.**—Restrictions upon the common law liability of a common carrier, for his benefit, inserted in a receipt drawn up by himself and signed by him alone, for goods intrusted to him for transportation, are to be construed most strongly against the common carrier. *Id.*
 5. **RESTRICTING CLAUSE IN COMMON CARRIER'S RECEIPT.**—If a common carrier, who undertakes to transport goods, for hire, from one place to another, "and deliver to address," inserts a clause in a receipt signed by him alone, and given to the person intrusting him with the goods, stating that the carrier is "not to be responsible except as forwarder," this restrictive clause does not exempt the carrier from liability for loss of the goods, occasioned by the carelessness or negligence of the employes on a steamboat owned and controlled by other parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of conveyance. The managers and employes of the steamboat are, in legal contemplation, for the purposes of the transportation of such goods, the managers and employes of the carrier. *Id.* 28.
 6. **CONSTRUCTION OF COMMON CARRIER'S RECEIPT.**—A receipt signed by a common carrier for goods intrusted to him for transportation for hire, which restricts his liability, will not be construed as exempting him from liability for loss occasioned by negligence in the agencies he employs, unless the intention to thus exonerate him is expressed in the instrument in plain and unequivocal terms. *Id.*
 7. **LIABILITY OF COMMON CARRIER.**—The presumption of the law is against a common carrier, except it be made to appear that the injury complained of could not have happened by the intervention of human means. *Agnew v. Steamer Contra Costa*, 428.

See EVIDENCE, 13, 14.

COMMON LAW.

1. **JUDGMENT AT COMMON LAW.**—At common law, the judgment of the Court was, that the plaintiff recover his debt or damages, or debt and damages, as the case might be, without any order or direction specifying how the money should be paid by the debtor or made by the officer. After judgment, the law, and not the Court, directed what proceedings should be had for the purpose of satisfying the amount adjudged to be due. *Reed v. Eldredge*, 347.
2. **COMMON LAW.**—Upon the adoption of the common law in this State, the Courts became subject to all its provisions, except in so far as the statutes worked a change in the common law rules. *Id.*
3. **COMMON LAW.**—The reasons which constitute the groundwork of the rules of the common law touching water rights have not lost their governing force in the mineral regions of this State. The conditions to which we are called upon to apply those rules are changed rather than the rules themselves. *Hill v. Smith*, 480.

COMPLAINT.

1. **COMPLAINT FOR RELIEF ON GROUND OF FRAUD.**—In an action brought to vacate a patent for land on the ground that its issuance was procured from the Government by false suggestions, fraudulent concealments, and by misrepresentations, the acts of fraud and misrepresentation on which the gen-

eral charge is based must be specified in the complaint, or it will not state facts sufficient to constitute a cause of action. *Semple v. Hagar*, 166.

See AMENDMENTS, 1; PARTITION, 3, 4; FORCIBLE ENTRY AND DETAINER, 1; INJUNCTION, 2.

COSTS.

See PRACTICE, 7.

CORONER.

1. SALARY OF CORONER OF SAN FRANCISCO.—The Act of 1864, entitled "An Act concerning the salary and fees of the Coroner of the City and County of San Francisco," reduces the salary of the Coroner of said city and county from four thousand to two thousand dollars per annum. The fifth section provides that "this Act shall not affect the salary of the present incumbent during the term for which he is elected." *Held*, that the fifth section did not apply to a successor of the then incumbent, appointed after his death to fill his unexpired term. *People v. Hale*, 150.

CORPORATION.

1. POWER OF ITS OFFICERS TO BIND A CORPORATION.—The officers of a corporation have no power to execute the note of the corporation for a debt having no relation to its business, due from a third person to the payee, nor can they ratify such note after its execution. A note made for such purpose creates no liability in the payee's hands against the corporation. *Hall et al. v. Auburn Turnpike Co.*, 235.

See CONSTITUTIONAL LAW, 5, 6; EVIDENCE, 6; MUNICIPAL CORPORATION, 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12.

COUNTER CLAIM.

See FINDINGS OF FACT, 2.

COUNTIES.

See ACTIONS, 1.

COUNTY COURT.

1. COUNTY COURTS.—County Courts are Courts of general criminal jurisdiction, and as such all intendments are in favor of the regularity of their proceedings. *People v. Blackcell*, 67.

COURTS.

See MEXICAN GRANT, 1; STATE COURTS, 1; RECORDS OF COURTS, 1, 2, 3.

CRIMINAL CASES.

See ASSAULT, 1, 2, 3, 4; EVIDENCE, 22.

DECREE IN EQUITY.

See JUDGMENT, 1; LIS PENDENS, 1.

DEED.

1. RECORD OF DEED NOT PROPERLY ACKNOWLEDGED.—The record of a deed not properly acknowledged does not give constructive notice to subsequent purchasers in good faith. *Harbutt v. Butenop*, 54.

2. **TAX DEED—WHEN VOID.**—A tax deed executed in 1860, for land sold for taxes, is void if the assessment shows that there was not any cash valuation of the lot which the deed purports to convey. *Id.*
 3. **DESCRIPTION OF LAND IN A DEED.**—If a deed recites two descriptions of the property conveyed, one of which sufficiently identifies the property, while the other is false in fact, the false description should be rejected as surplusage. *Reed v. Spicer et al.* 61.
 4. **DEED OF A DITCH.**—A deed conveying a right of way upon land, in, to, and for a ditch called the Mountain Brow Ditch, is a conveyance of the ditch itself. *Id.*
 5. **ACKNOWLEDGMENT OF A DEED.**—A consular agent of the United States in a foreign port, on the 15th of January, 1859, or prior thereto, was not empowered to take and certify the acknowledgment of the execution of a deed conveying real estate in this State. *McMinn v. O'Connor*, 242.
 6. **CERTIFICATE OF ACKNOWLEDGMENT OF DEED.**—A certificate of the acknowledgment of the execution of a deed is defective if it does not state that the person making the acknowledgment is known to the officer, or proved to him to be the person described in and who executed the same. *Id.*
 7. **CERTIFIED COPIES OF DEEDS AS EVIDENCE.**—Copies of deeds duly filed for record in the Recorder's office of the proper county, or which, after having been duly filed for record, have been recorded in the proper book of records, are admissible in evidence in all Courts and in all actions and proceedings with the like effect as the originals could be if produced, upon proof of the loss of the originals, or that they are not in the power of the party offering the copies. *Id.*
 8. **DEEDS DULY RECORDED.**—Deeds not properly acknowledged or proved, but filed for record or recorded in the proper book of the proper county, are not duly filed for record or duly recorded. *Id.* 244.
 9. **CERTIFIED COPY OF RECORDED DEED NOT DULY ACKNOWLEDGED AS EVIDENCE.**—A certified copy of a deed filed for record, or recorded in the proper book of records prior to the Act of April 30, 1860, but which was not acknowledged or proved as required by law, is not admissible in evidence without proof, being first made that the original deed was genuine, and was, in truth, executed by the grantor or grantors therein named. *Id.*
 10. **DEED NOT DULY ACKNOWLEDGED, EXECUTED AND WITNESSED IN A FOREIGN COUNTRY.**—Where a deed not properly acknowledged is executed and witnessed by a subscribing witness in a foreign country, proof that it was executed by the grantor is sufficient to entitle it to be received in evidence without producing the attesting witness, or accounting for his absence, or proving his handwriting. *Id.* 245.
 11. **EVIDENCE OF TITLE ACQUIRED PENDING LITIGATION.**—If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending the litigation, evidence of this fact cannot be introduced, unless it is pleaded as a defense in a supplemental answer. *Id.* 246.
- See EVIDENCE, 1, 9, 19, 20; JUDGMENT, 1; LIS PENDENS, 1; TENANTS IN COMMON, 1; TRUST, 3; CONVEYANCE, 1.**

DEFAULT.

See JUDGMENT, 11, 12.

DEMURRER.

See ARREST OF JUDGMENT, 1.

DEPOSITION.

1. **DATE OF CERTIFICATE TO DEPOSITION.**—If, at the end of a deposition taken by a Commissioner out of the State, there is a *jurat* giving the date when the deposition was subscribed and sworn to, it is not necessary that the further certificate of a compliance with the four hundred and thirtieth section of the Practice Act should be dated. *Elgin v. Hull*, 373.
2. **DEPOSITION TAKEN BY STIPULATION.**—If the parties stipulate that a Commissioner may take a deposition upon written interrogatories, and the stipulation says nothing about the day the same may be taken by the Commissioner, it is not necessary that the Commissioner state in his certificate the day the same was taken. *Id.*
3. **ESTOPPEL IN RELATION TO DEPOSITION.**—If a commission to take the deposition of a witness out of this State is issued, on the application of one party without the consent of the other, to a person who is not a Judge, or Justice of the Peace, or a Commissioner appointed by the Governor of this State, and the party who does not consent, after the appointment, files cross interrogatories, and stipulates as to the manner in which the deposition shall be returned, he is estopped from saying that the Commissioner was improperly appointed. *Crowther v. Rowlandson*, 386.

DISCLAIMER.

See PLEADINGS, 3.

DITCHES.

1. **A DITCH NOT AN EASEMENT.**—A ditch used for the conveyance of water for mining purposes is not a mere easement or incorporeal hereditament. *Reed v. Spicer et al.* 61.
See DEED, 4; PARTITION, 1; WATER RIGHTS, 4, 5, 6, 7.

DISTRICT ATTORNEY.

1. **ASSISTANT COUNSEL FOR DISTRICT ATTORNEY.**—Whether the District Attorney should be allowed associate counsel to aid him in the management of a case is a matter resting in the discretion of the Court, and where there is no abuse of that discretion the appellate Court will not interfere. *People v. Blackwell*, 67.

See EVIDENCE, 2.

EASEMENT.

See DITCHES, 1.

EJECTMENT.

1. **NOTICE TO QUIT.**—A landlord cannot maintain an action to recover possession of land from a tenant at will without first giving him notice to quit. *Frisbie v. Price*, 253.
2. **FORMER SUIT PENDING AS A DEFENSE IN EJECTMENT.**—A defendant in an action to recover the possession of land is not entitled to a judgment of dismissal on the ground that a former suit between the same parties, brought for the recovery of the same land, is still pending, unless it is averred in the answer that the second action is for the same injury as the first, and that the same matters are in issue that were in issue and might have been tried in the first action. *Vance v. Olinger*, 358.
3. **SUITS IN EJECTMENT.**—A party may have two suits against the same defendant for the recovery of the same land pending at the same time, if the second is brought on a title acquired after the commencement of the first. *Id.*

4. **OUSTER OF A TENANT IN COMMON BY HIS CO-TENANT.**—If one tenant in common incloses and enters into the exclusive possession of a portion of the common lands, not exceeding in quantity the number of acres which he would be entitled to have allotted to him on partition of the whole, and refuses to allow a co-tenant to occupy this portion with him, it is an ouster of the co-tenant, and he may maintain ejectment and be let into the possession of the part from which he is thus excluded. *Carpentier v. Webster*, 548.
 5. **OUSTER BY TENANT IN COMMON.**—One tenant in common may be guilty of an ouster of a co-tenant by excluding him from a portion less than the whole of the property held in common. *Id.*
 6. **A REFUSAL TO LET A CO-TENANT INTO POSSESSION AN OUSTER.**—If one tenant in common is in the exclusive possession of a portion less than the whole of the common lands, and his co-tenant demands of him to be let into possession of the same on the ground of his joint ownership, and the other, while admitting the several title of the co-tenant, refuses to let him into possession, this refusal is an ouster. *Id.*
 7. **OUSTER MAY RESULT WHEN TITLE IS ADMITTED.**—If a tenant in common denies the several title of a co-tenant, but lets him into possession, it is not an ouster; but if he admits the several title of a co-tenant and refuses to let him into possession, it is an ouster. *Id.*
 8. **OUSTER BY ONE TENANT IN COMMON IN CASE OF MEXICAN GRANT NOT SURVEYED.**—If several are tenants in common in a grant of land made by Mexico of a given quantity, to be located within the exterior boundary lines of a much larger quantity, and no survey or location of the quantity granted has been made, the exclusive possession by one of the tenants in common of a portion less than the whole of the land within the exterior boundary lines of the larger quantity, and his refusal to let a co-tenant into possession of the same, is an ouster. *Id.*
- See **SUSCOL RANCHO**, 2; **ABATEMENT**, 1; **TENANT**, 1; **DEED**, 11; **EVIDENCE**, 3, 20; **TENANTS IN COMMON**, 2, 3, 4

ELECTIONS.

1. **RIGHT TO SHOW THAT AN ELECTION WAS INFLUENCED BY BRIBERY.**—If a majority of the electors of a municipal corporation vote in favor of a proposition for the corporation to subscribe to the capital stock of a railroad company, under a law directing such subscription to be made if such majority vote is obtained, the municipal authorities, on proceedings to compel them to make such subscription, have a right to allege and show that the election was not fairly conducted, but was influenced by bribery and corruption practised and perpetrated by the railroad company and its employés. *People v. Supervisors of San Francisco*, 655.

EMINENT DOMAIN.

See **CONDEMNATION OF LAND**, 1, 2, 3, 4, 5.

ESTATES OF DECEASED PERSONS.

1. **RATE OF INTEREST ON CLAIMS AGAINST INSOLVENT ESTATES.**—If the estate of the deceased is insolvent, the administrator cannot pay more than ten per cent interest per annum, from and after the time of issuing letters, on any claim against the estate contracted after May 20th, 1861, even if the rate of interest specified in the contract is more than ten per cent per annum, and the claim is secured by a mortgage. *Ellis v. Polhemus*, 353.
2. **CLAIM AGAINST AN ESTATE.**—*Per Sanderson, O. J.*—The word "claim" as

used in the Act concerning the estates of deceased persons, when it speaks of claims against an estate, is broad enough to include a mortgage. *Id.*

3. CASES COMMENTED ON.—The cases of *Fallon v. Butler*, 21 Cal. 24, and *Ellisen v. Halleck*, 6 Cal. 386, and *Faulkner v. Folsom's Executors*, 6 Cal. 412, commented on. *Id.*
4. *Per Rhodes, J.*—A note secured by mortgage is a claim against the estate, but the mortgage given to secure the note is not such claim. *Id.* 355.
5. *Per Shafter, J., Sawyer J., concurring.*—The word "claim," as used in the one hundred and thirty-first section of the Act concerning the estates of deceased persons, includes mortgages as well as claims at large against the estate. *Id.* 357.

See WILL, 1, 2.

ESTOPPEL.

1. ESTOPPEL.—A defendant is estopped from proving the averments of his answer to be false. *Wilcoxon v. Burton*, 235.

See DEPOSITION, 8.

EQUITY.

1. BILL IN EQUITY TO ENFORCE SALE OF PERSONAL PROPERTY.—As a general rule Courts of equity do not enforce the specific performance of contracts for the sale of personal property. When such contracts are enforced by Courts of equity, it is not upon the ground of the insolvency of the defendant, but because the character of the property is so peculiar in itself, or its connection with the complainant's business is such that no adequate damages could be given at law. *McLaughlin v. Piatti*, 463.
2. *IDEM.*—A bill in equity will not lie to enforce the specific performance of a contract for the sale of cattle not possessing any especial value, except as merchandise. *Id.*
3. REMOVAL OF LIEN OF A JUDGMENT FROM LAND.—One who purchases land subject to the lien of a judgment obtained by fraud against his grantor is not entitled to have a Court of equity remove the judgment lien and enjoin a sale of the land under the judgment, unless he shows affirmatively that he will be injured by an enforcement of the lien by a sale of the land on execution. *Marriner v. Smith*, 649.

See FRAUDULENT CONVEYANCE, 1, 2; REFEREE, 1; PATENT, 2; CONVEYANCE, 1; MORTGAGE, 1; JUDGMENT, 16, 17.

EVIDENCE.

1. CERTIFIED COPY OF A DEED AS EVIDENCE.—A party claiming title under a deed duly acknowledged is entitled to have a certified copy of the record of the same received in evidence, upon making statute proof that he never had control of the original, and that it is not then in his power or control. *Hurlburt v. Butenop*, 54.
2. EVIDENCE THAT WITNESS EMPLOYED ASSOCIATE COUNSEL.—If the District Attorney is assisted by associate counsel in the prosecution of a criminal case, counsel for the defense have a right to ask the prosecuting witness if he has employed such associate counsel. *People v. Blackwell*, 67.
3. CERTIFICATE OF PURCHASE AS EVIDENCE.—A certificate of purchase of real estate, executed by a Sheriff on a sale made by virtue of an execution issued on a judgment, is incompetent as evidence to establish any right, either legal or equitable, to the possession of the premises therein described. *McMinn v. O'Connor*, 246.

4. ORDER OF PRODUCING TESTIMONY ON TRIAL.—The assignee of a contract who claims under it may introduce it in evidence before giving proof that the opposite party had notice of its assignment. *Doll v. Anderson*, 250.
5. CONTRACT OF SALE OF LAND AS EVIDENCE.—In an action for the recovery of real estate, a contract in writing signed by both plaintiff and defendant, for the sale and conveyance of the land in dispute by plaintiff to defendant, is admissible in evidence on behalf of plaintiff, for the purpose of proving that defendant obtained possession of the premises from plaintiff, and went in under him. *Frisbie v. Price*, 253.
6. EVIDENCE IN SUIT AGAINST A CORPORATION.—In an action brought against a corporation by the payee of a note executed by its officers in the name of the corporation, for a debt due the payee from a third person, and having no relation to the business of the corporation, evidence that the note was not given for the debt of the corporation is admissible under an answer denying the execution of the note. *Hall et al. v. Auburn Turnpike Company*, 255.
7. PROOF OF EXECUTION OF INSTRUMENTS IN WRITING.—An instrument in writing, executed and attested by a subscribing witness in a foreign country, or at a place beyond the jurisdiction of the Court, can be proved by evidence of the handwriting of the party who executed it. *McMinn v. Whelan*, 309.
8. ASSIGNEE OF VOID JUDGMENT.—If the assignee of a void judgment, together with the cause of action on which it was rendered, offers the same in evidence, this does not prove that the assignee is a creditor of the defendant in the judgment. *Id.* 316.
9. DEED FOR LAND SOLD FOR TAXES AS EVIDENCE.—If the certificate of sale of property for taxes is made to "Michael Dundon," and the deed under the certificate is made to "Patrick Michael Dundon, Jr.," and it appears in proof that there were two persons, Michael and Patrick Michael, and there is no evidence that Patrick Michael acquired the right of Michael by assignment, the deed is not admissible in evidence without proof that the two names are for the same person. *McMinn v. Whelan*, 317.
10. PATENT AS EVIDENCE OF TITLE.—A patent is not conclusive, as evidence of title as against a grant made by the legislative department, prior to the patent. *Meyerle v. Asue*, 326.
11. CONFLICTING PATENTS AS EVIDENCE.—If a plaintiff in ejectment offers in evidence a patent of the United States and rests, the defendant is entitled to offer in evidence a State patent of prior date for the same land, accompanied with proof that the land was selected by the State as part of the five hundred thousand acres granted to the State, and that the United States approved of the selection. *Id.*
12. EVIDENCE CONTRADICTING ADMISSIONS IN PLEADINGS.—If the complaint in an action against husband and wife to foreclose a mortgage executed by the husband alone, avers that the mortgagor, at the time of its execution, owned the land described in the mortgage as a tenant in common with another person, each owning an undivided one half, and the defendants in their answers admit this allegation, but set up as an affirmative defense a claim to a homestead, evidence to show a parol partition prior to the execution of the mortgage is irrelevant. *Elias v. Verdugo*, 420.
13. LIABILITY OF STEAMBOAT AS A COMMON CARRIER.—In an action against a steamboat, as a common carrier, for the loss of a horse by the explosion of the boiler, alleged by the plaintiff to have been caused by racing with a rival steamer, evidence on the part of the defense to show the good condition of the boiler is irrelevant, both on the question of liability and of damages. *Agnew v. Steamer Contra Costa*, 428.

14. **SAME.**—In such case, evidence on the part of the defense that the engine and boilers were strong, and that extraordinary care was used by the officers and crew of the steamer in their management while racing, is also irrelevant. *Id.*
15. **EVIDENCE IN FORCIBLE ENTRY AND UNLAWFUL DETAINER.**—If D. and H. are in the peaceable possession of a lot of land, and S. and S., accompanied by others—their employés—forcibly evict them therefrom and take possession, and then lease the lot to R., who enters into peaceable possession, and five days afterwards D. and H., with others, forcibly dispossess R. and take possession, and R. brings an action of forcible entry against them, D. and H. cannot introduce evidence of their prior eviction by S. and S. in defense. *Roff v. Duane*, 568.
16. **A LEASE IN FORM NOT SIGNED BY THE LESSOR.**—A lease in form, which contains the name of one person as lessor in the body of it, and is signed by another person, and also the lessee, is not a lease, nor is it admissible in evidence in an action of forcible entry and unlawful detainer on behalf of the nominal lessee, (the plaintiff in the action,) for the purpose of showing the extent of the property which the plaintiff claims he possessed. *Id.*
17. **EFFECT OF STATING PURPOSE OF EVIDENCE.**—If a document is offered in evidence, and the party offering it states that he offers it for a particular purpose, it must be confined in its effect as evidence to the purpose expressed when it was offered. *Id.*
18. **PROOF OF INTENT WITH WHICH HOMICIDE WAS COMMITTED.**—In ascertaining the degree of guilt of one who has committed a homicide, it is important to determine the intent with which the act was done. The intent may be proved by evidence, direct or circumstantial, tending to establish the fact. *People v. Pool*, 575.
19. **PROOF THAT DEED WAS INTENDED AS MORTGAGE.**—Parol testimony is admissible to show that a deed, absolute on its face, was intended by the parties to be a mortgage, and this rule applies to cases in law as well as in equity. *Cunningham v. Hawkins*, 603.
20. **EVIDENCE IN EJECTMENT.**—In actions to recover real property, testimony is admissible to show that a deed, absolute on its face, was intended as a mortgage. *Id.*
21. **INTERLINEATION IN WRITTEN CONTRACT.**—If the owner of a horse delivers him to another party in pledge to secure the payment of a debt, and the parties contract in writing that the pledgee may keep the horse one year, paying for his use a stipulated sum, and may further keep him a second year upon the same terms, by giving proper notice of his election to do so, and the copy of the contract kept by the pledgee is interlined the next day by consent of parties so as to allow the pledgee to keep the horse two years more, instead of one, and the owner afterwards sells the horse and contract to a third party, and the pledgee gives notice of his election to keep the horse one year more, and at the end of that time accepts from the purchaser the money due from the pledgee, these circumstances are evidence that the pledgee regarded the original contract as binding. *Anderson v. Doll*, 607.
22. **TESTIMONY IN CRIMINAL CASE.**—On trial for an assault with intent to commit murder it appeared that the defendant committed the assault in the prosecutrix's house, and the prosecutrix immediately escaped and went to a butcher shop a few rods away, and that the defendant followed her thither after some few minutes had elapsed; *Held*, that what occurred between the prosecutor and defendant at the butcher's shop was admissible in evidence, at least on the question of intent. *People v. Yslas*, 632.

See SWAMP AND OVERFLOWED LANDS, 4, 5; TRUST, 1, 2, 3, 4; PAROL EVIDENCE, 1; DEED, 7, 9, 10; NEW TRIAL, 4; MINING, 1; FINDING OF FACTS, 2; WATER VOL. XXVII.—45

RIGHTS, 2, 3; CRIMINAL CASES, 5; JUDGMENT, 15; HOMICIDE, 5; WITNESS, 5, 6, 7.

FEEES OF OFFICERS.

See TAX COLLECTORS, 1.

FINDINGS OF FACT.

1. FINDINGS OF THE COURT.—The findings of a Court cannot be altogether detached from each other and considered separately. If a particular finding be doubtful or obscure, reference may be had to the others to ascertain its true meaning. *Millard v. Hathaway*, 140.
2. DEFECTIVE FINDING OF FACTS.—If the answer sets up a counterclaim and the Court finds that the defendant introduced no evidence as to the counterclaim, the finding is defective; but if the evidence is all before the appellate Court, and it appears that no testimony was introduced by either party as to the counterclaim, the judgment will not be reversed on account of the defective finding. *Schroeder v. Johns*, 281.
3. ISSUES OF FACT RAISED BY ANSWER.—Where there are no findings of fact in an action tried by the Court, all the issues of fact raised by the answer are deemed to have been found in favor of the party who recovers judgment. *Buckout v. Swift*, 434.

See ARREST OF JUDGMENT, 1; EVIDENCE, 16.

FORCIBLE ENTRY AND DETAINER.

1. COMPLAINT IN FORCIBLE ENTRY AND DETAINER.—A complaint in an action under the Forcible Entry and Detainer Act, other than actions against tenants holding over as provided in said Act, does not state facts sufficient to constitute a cause of action, unless it allege a forcible entry or a forcible detainer. *McElroy v. Igo*, 375.
2. FORCIBLE ENTRY AND UNLAWFUL DETAINER.—The proceedings provided for in the Act of 1850, concerning "forcible entry and unlawful detainer," are not a substitute for the action of ejectment. The object of the Act, (excluding the thirteenth section,) is to redress wrongs, occasioned by force used or threatened by the defendant, by restoring possession to the plaintiff, and punishing the defendant with fine and treble damages. *Owen v. Doty*, 502.
3. *IDEM*.—The plaintiff must have had the actual possession when the wrongful or forcible entry was made, and if a forcible detainer alone is complained of, the entry of the defendant must have been unlawful. *Id*.
4. *IDEM*.—If the entry of the defendant was lawful, the plaintiff cannot, when his right to the possession has expired, expel him therefrom, or by using or threatening force make his entry unlawful. *Id*.
5. COMPLAINT AGAINST TENANT HOLDING OVER.—A complaint in an action brought under section thirteen of the Forcible Entry and Unlawful Detainer Act of 1850, which avers that "when the plaintiff was peaceably in the actual possession of the premises, the defendant, by permission of the plaintiff, entered upon the same," avers a license to enter, and fails to state that the relation of landlord and tenant existed between the parties, and therefore contains no cause of action. *Id*.
6. RENTS AND PROFITS IN FORCIBLE ENTRY AND DETAINER.—As the right to the possession of the premises is not in issue in an action for forcible entry and unlawful detainer, if it is found that at the time of the alleged forcible entry the plaintiff had the actual and peaceable possession, and that the defendants unlawfully detained the premises, the plaintiff is entitled to recover the monthly rents and profits during the time of the unlawful detainer, with-

out regard to the nature or extent of the right or title by which he held the possession. *Roff v. Duane*, 568.

See EVIDENCE, 15.

FORGERY.

See INDICTMENT, 1; CRIMINAL PRACTICE, 2.

FORMER JUDGMENT AS A BAR.

1. **FORMER JUDGMENT AS A BAR.**—If the defendants demur to the complaint for misjoinder of parties defendant, as well as for other reasons, and at the same time answer, and the parties stipulate to submit the issues of law and fact to the Court upon the pleadings, and a general judgment is rendered for the defendants, it is a bar to another suit for the same cause of action, although the real ground upon which the judgment was based was the misjoinder of parties defendant. *People v. Skidmore*, 289.
2. **EXPRESSION OF OPINION ON A POINT NOT BEFORE THE COURT.**—If a judgment is rendered generally for the defendants upon issues of both law and fact, and the Supreme Court upon appeal affirm the judgment, a statement in the opinion that the judgment was affirmed because there was a misjoinder of parties defendant, and that the effect of the judgment will not preclude the plaintiff from suing again, does not prevent the judgment from being a bar to a new suit brought for the same cause of action. *Id.*
3. **JUDGMENT RENDERED ON DEMURRER AS A BAR.**—If the defendants demur and answer at the same time, and issues of law and fact are submitted to the Court, and an order is made sustaining the demurrer by reason of a misjoinder of parties defendant, and judgment is rendered for the defendants upon the order, the judgment will not bar a new action. *Id.*
4. **MATTERS *res judicata*.**—If a judgment has been rendered by a Court of competent jurisdiction, and a certain matter was necessary to be averred in the complaint and found to be true by the Court, to authorize the rendition of the judgment, the truth of this matter becomes *res judicata*, and not subject to be again litigated between the same parties. *People v. Supervisors of San Francisco*, 655.

See BAR, 1.

FORWARDERS.

See COMMON CARRIERS, 2.

FRAUD.

See COMPLAINT, 1; ANSWER, 2.

FRAUDS, STATUTE OF.

See INDORSER, 1, 2.

FRAUDULENT CONVEYANCE.

1. **ACTION TO SET ASIDE CONVEYANCE OF LAND.**—A lien on land acquired by an attachment, cannot be rendered effectual for the purpose of impeaching a conveyance of the land made by the defendant in the attachment, until judgment is obtained in the suit in which the attachment issued. *McMinn v. Whelan*, 315.
2. **CREDITOR WITHOUT JUDGMENT.**—A creditor at large, without a judgment, is

not in a position to maintain an action to set aside a conveyance of property made by his debtor. *Id.*

See EVIDENCE, 8.

FRAUDULENT JUDGMENT.

1. **FRAUDULENT CONFESSION OF JUDGMENT.**—A voluntary confession of a judgment made upon a *bona fide* debt by the debtor in favor of the creditor, without the knowledge of the creditor, and the issuance of an execution thereon at the request of the debtor, and a levy on the debtor's goods by virtue thereof—also without the knowledge of the creditor—for the purpose of enabling the creditor to obtain priority over other creditors of the debtor, is such a fraud upon the other creditors as renders the judgment and levy void, as to an attachment or execution in favor of the other creditors afterwards levied on the same property. *Wilcoxon v. Burton*, 233.
2. **VOLUNTARY JUDGMENTS—WHEN VOID.**—A judgment rendered upon confession of the debtor, and at his instance, without any request on the part of the creditor, and without his knowledge, is void as between the parties, and will not bar an action brought by the creditor on the same cause of action, nor will it estop the debtor from denying all the facts set forth in it. *Id.*
3. **RATIFICATION OF JUDGMENT.**—When a debtor confesses judgment without the knowledge or request of the creditor, and the creditor thereafter ratifies it, and attempts to enforce it, it will become binding between the parties to it by force of the ratification, but such ratification cannot affect rights acquired by other parties prior to the ratification. *Id.*
4. **CONFESSION OF A JUDGMENT FOR A SUM GREATER THAN IS DUE.**—The execution and delivery of a note by the debtor to his creditor for a sum greater than is actually due, for the purpose of defrauding other creditors of the debtor, and the voluntary confession of a judgment on the same by the debtor, renders the judgment fraudulent and void as to the other creditors of the debtor. *Id.*
5. **STATEMENT CONFESSING JUDGMENT.**—If the statement upon which a voluntary confession of judgment is made does not correctly describe the debt, the judgment is void as to the creditors of the judgment debtor. *Id.*

GREENBACKS.

See LEGAL TENDER NOTES, 1, 2.

GOLD COIN CONTRACT.

See SPECIFIC CONTRACT ACT, 82; JUDGMENT, 7.

HOMICIDE.

1. **JUSTIFIABLE HOMICIDE.**—If several persons are on an island, a part of the public domain, engaged in gathering the eggs of wild birds deposited there, and others attempt to land there to engage in the same pursuit, and their attempt to land is resisted by force by the party first there, they are justified in using such force as may be necessary to effect their object; and if one of the opposing party is slain, it will be justifiable homicide. *People v. Batchelder*, 73.
2. **SAME.**—If the persons attempting to land on the island are armed with guns, this does not affect their right to land; and if they are attacked by those on shore with deadly weapons and murderous intent, and their lives placed in danger, they are not obliged to retreat, but may stand their ground, and, if need be, kill their assailants. *Id.*

3. **JUSTIFICATION OF A HOMICIDE.**—The right to take life in defense of one's person, habitation, or property, or for the protection of those whom by the law of nature he is bound to protect, is founded on necessity; and when this defense is interposed in justification of a homicide, the first inquiry is as to the alleged necessity. *People v. Pool*, 574.
4. **SAME.**—If an officer in fresh pursuit of criminals comes suddenly upon several of them, and calls out "You are my prisoners—surrender:" and at the same time points a gun towards them, they are not justified in firing on him, or in taking his life. *Id.*
5. **SAME.**—If several persons commit a robbery, and immediately flee from the scene of it, and are pursued soon after by an officer, who overtakes them at a distance of ten or twelve miles from the place where the crime was committed, and is slain by them in an attempt to arrest them, on the trial for the homicide the People may introduce evidence of the robbery, and the defendant's connection with it. *Id.*

HOMESTEAD.

1. **HOMESTEAD.**—A homestead cannot be carved out of land held in joint tenancy or by tenancy in common. *Ellis v. Verdugo*, 420.
2. **LIEN OF JUDGMENT AGAINST HUSBAND ON THE HOMESTEAD.**—If, while a judgment is standing against the husband, the husband and wife make a sale of the homestead, and at the same time make a relinquishment of the homestead right in the manner required by law, so that the two constitute but one transaction, and the homestead does not exceed in value five thousand dollars, the lien of the judgment will not attach to the homestead, and a Court of equity will enjoin a sale of the same upon an execution issued on the judgment. *Marriner et al. v. Smith et al.*, 649.
3. **SAME.**—If husband and wife make a relinquishment of the homestead right, and afterwards sell the homestead property, and the relinquishment takes effect before the sale, the lien of the judgment will attach to the property. *Id.*

INDICTMENT.

1. **CHARGE OF TWO OFFENSES IN INDICTMENT.**—If an indictment for forgery contains two counts, in each of which a copy of the instrument alleged to have been forged is set out, and the copies are alike, it will not be presumed that each is a copy of only one and the same original instrument, without an allegation to that effect in the second count. *People v. Shotwell*, 400.
2. **INDICTMENT FOR LARCENY.**—An indictment for larceny which charges that the defendant "did feloniously, wilfully, and unlawfully, and with force and arms, steal, take, and carry, lead, and drive away," etc., contains a sufficient statement of the intent with which the taking was done, without an averment that the property was taken with a felonious intent. *People v. Brown*, 500.
3. **INDICTMENT FOR MURDER.**—In an indictment for murder it is not necessary to aver the means by which the homicide was committed, or the nature and extent of the wound, or the part of the body upon which it was inflicted. *People v. King*, 509.
4. **STATEMENT OF DEGREE OF MURDER IN INDICTMENT.**—An indictment for murder should not designate the degree of the murder. If the indictment does state the degree of the murder, it does not vitiate it, but the statement of the degree may be treated as surplusage. *Id.*

See **CRIMINAL PRACTICE**, 1.

INDORSER.

1. **STATUTE OF FRAUDS.**—An indorsement made by a third person on a contract entered into between two parties, and made simultaneously with the contract, by which the indorser, without expressing any consideration received, agrees that the undertaking of one of the contracting parties shall be fulfilled, is an original and not a collateral promise of the indorser to answer for the debt of another, and not within the Statute of Frauds. *Otis v. Haseltine*, 82.
2. **SAME.**—By such act the indorser makes the contract his own, and the consideration therein expressed becomes the consideration of his promise. *Id.*

See **BAR**, 1.

INJUNCTION.

1. **INJUNCTION TO RESTRAIN TRESPASSES.**—An injunction will not be granted to restrain the commission of trespasses where the party complaining has a complete and adequate remedy at law. *Leach v. Day*, 643.
2. **COMPLAINT TO ENJOIN TRESPASSES.**—Where a complaint, in an action to restrain the commission of trespasses, avers that the defendant has torn down the fences of plaintiff, and entered his close for the purpose of opening a private road across plaintiff's land, under a claim of right founded on an order of a Board of Supervisors laying out a road, and does not state that the right has been settled in an action at law, and that the defendant continues his acts after a Court of law has decided against him, it does not state facts sufficient to constitute a cause of action. *Id.*
3. **AN ORDER LAYING OUT A ROAD.**—An order of a Board of Supervisors laying out a road, which is unconstitutional and null and void upon its face, does not affect or cloud the title to the land over which it passes, and an injunction will not be granted to restrain the carrying of the order into effect, but the party will be left to his remedy at law. *Id.*

See **CONTEMPT**, 1; **MORTGAGE**, 2; **EQUITY**, 3.

INSTRUCTION TO JURY.

1. **REFUSAL OF AN INSTRUCTION.**—It is not error to refuse an instruction asked when the same has already been given in substance. *People v. King*, 509.

See **CHARGE OF COURT**, 1.

INSANITY.

1. **PROOF OF INSANITY.**—Proof that at the time a grantor delivered a conveyance of property to the grantee, he was incapacitated from taking a rational care of his property by reason of mental delusion, is sufficient to justify a Court in setting aside the conveyance on the ground of the insanity of the grantor. A total loss of understanding is evidence of an imbecile rather than of an insane mind. *Crowther v. Rowlandson*, 380.

See **LIMITATION**, **STATUTE OF**, 5.

IMPEACHMENT OF WITNESS.

See **WITNESS**, 2, 3, 4.

JUDGE AT CHAMBERS.

See **RECORDS OF COURT**, 1.

JUDGE OF COURT.

See CONDUCT OF JUDGE, 1.

JUDGMENT.

1. DECREE IN ACTION BROUGHT BY ONE FOR HIMSELF AND ON BEHALF OF OTHERS.—Where an action is brought by one of several persons, claiming title from a common source, on his own behalf and in behalf of all others interested in the same manner as himself, to set aside a deed executed to others by the same grantor under whom plaintiff claims, on the ground of fraud, the parties named in the complaint, for whose benefit the action is brought, are entitled to the benefit of the decree declaring the deed fraudulent. *Muributt v. Butenop*, 54.
2. JUDGMENT MUST FOLLOW SUMMONS AND PRAYER OF COMPLAINT.—If judgment is rendered in favor of plaintiff by default, the Court cannot grant any greater relief than is demanded in the prayer of the complaint and specified in the summons. *Lamping & Co. v. Hyatt et al.*, 102.
3. JUDGMENT AGAINST PERSONS NOT NAMED IN THE COMPLAINT.—If persons are served with summons who are not named in the complaint, either by real or fictitious names, it is error to render judgment against them by default. *Id.*
4. JUDGMENT NOT TO EXCEED AMOUNT PRAYED FOR.—If the complaint on a promissory note prays for judgment for a sum certain, which sum is the principal and interest due when the complaint is filed, judgment by default should not include interest accruing after the complaint is filed. *Id.*
5. JUDGMENT FOR INTEREST WHERE RATE IS NOT NAMED.—If the prayer for judgment asks for interest to accrue after the complaint is filed, and neither the prayer or summons mention the rate of interest, the clerk should not render judgment for a rate greater than ten per cent per annum. *Id.*
6. GOLD COIN JUDGMENT.—If the complaint does not pray for a gold coin judgment, and the summons does not say that judgment will be taken for gold coin, the clerk should not, on default, render a gold coin judgment. *Id.*
7. WHAT IS NOT GOLD COIN CONTRACT.—If a promissory note has the words "in gold coin" after the words "value received," but does not contain the words "in gold coin" in the promise to pay, judgment should not be rendered payable in gold coin, although there is in the instrument a subsequent promise to pay the difference between the value of gold coin and paper currency of the United States if not paid in gold coin. *Id.*
8. FINAL JUDGMENT ON BILL TO OBTAIN INJUNCTION.—Where a bill is filed by the people on the relation of the Attorney-General to enjoin the State Treasurer from paying money out of the Treasury, on the ground of the unconstitutionality of the Act directing the Treasurer to make the payment, and the Court on the final trial deny the injunction, the judgment denying the injunction should not contain a clause adjudging and decreeing that the Treasurer pay over the money as required by the law. *People v. Pacheco*, 227.
9. WHAT CLAIM IS MERGED BY JUDGMENT.—A judgment by confession merges no claim of the creditor except such as are included in it by some form of direct statement. *Wilcoxon v. Burton*, 233.
10. JUDGMENT WITHOUT JURISDICTION OF PERSON.—If it appear by the record, or otherwise, that the Court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it comes directly or collaterally in issue, and a sale of property under it will be void also. *McMinn v. Whelan*, 309.

11. JUDGMENT AFTER DEFAULT.—The Clerk of a Court, in entering a judgment after default, acts in a mere ministerial capacity, and cannot render a judgment granting any relief beyond that warranted by the facts stated in the complaint. *Wallace v. Eldridge*, (No. 1,) 495.
 12. ENTRY OF JUDGMENT BY CLERK AFTER DEFAULT.—If the note sued on is payable in money generally, and the complaint contains a copy of the same, the Clerk cannot, after default, enter a judgment payable in gold coin, although the complaint prays for such judgment. *Id.*
 13. JUDGMENT ON GOLD COIN JUDGMENT.—If the complaint in an action on a judgment avers that the judgment sued on was rendered payable in gold coin, and defendant makes default, the Clerk should enter judgment payable in the same kind of money. *Wallace v. Eldridge*, (No. 2,) 498.
 14. JUDGMENTS.—If the decision of the Court below was correct when it was made, the appellate Court will not reverse the judgment by reason of any matter of fact which was not shown or offered in the Court below. *Id.*
 15. ADMISSION OF ILLEGAL TESTIMONY.—If illegal testimony is admitted by the Court below, and the appellate Court cannot determine whether the finding of the Court below was based on this or other testimony in the case, the judgment will be reversed. *Roff v. Duane*, 568.
 16. DISCHARGE OF A JUDGMENT.—A payment of part of the amount due upon a money judgment under an agreement that it shall operate as satisfaction in full will not discharge the judgment. *Deland v. Hiatt*, 611.
 17. VOID AGREEMENT.—An agreement to discharge a judgment for a sum less than the amount for which it was rendered is void. *Id.*
- See ARREST OF JUDGMENT, 1; PATENT, 1, 2; STATE COURTS, 1; MEXICAN GRANT, 1, 2; FRAUDULENT JUDGMENT, 1, 2, 3, 4, 5; PAROL EVIDENCE, 1; FORMER JUDGMENT AS A BAR, 1, 2, 3; SPECIFIC CONTRACT ACT, 2, 3; COMMON LAW, 1; WATER RIGHTS, 4; MORTGAGE, 1; CONTRACT, 1; BAR, 1; EQUITY, 3; MANDAMUS, 8.

JUDGMENT ROLL.

See PRACTICE, 1.

JUDGMENT LIEN.

See LIEN, 1, 2.

JURY.

1. WAIVER OF JURY.—A jury may be waived by the parties by a failure to file with the clerk, at least six days before the commencement of the term at which the action may be tried, a notice that a jury will be required. *Doll v. Anderson*, 250.
2. RIGHT OF COURT TO SUBMIT ISSUE OF FACT TO A JURY.—The Court has a right to direct an issue of fact to be tried by a jury, notwithstanding the parties have waived the same by a failure to give notice at least six days before the commencement of the term that one will be required. *Id.*

See SPECIAL VERDICT, 1.

JURISDICTION.

1. JURISDICTION OF SUPREME COURT.—The Supreme Court has no jurisdiction

in an action to recover a money judgment where the amount of the judgment, exclusive of costs, is less than two hundred dollars. *Bolton v. Landers*, (No. 2,) 106.

See COUNTY COURT, 1; CONDEMNATION OF LAND, 3, 4; APPEARANCE IN AN ACTION, 1; SUMMONS, 1, 2, 3, 4.

JUSTICE OF THE PEACE.

See LIEN, 1, 2.

LAND.

1. LEGISLATIVE GRANT OF LAND.—A legislative grant is as effectual to pass title to lands owned by the Government as a grant evidenced by a patent. *Meyerle v. Ashe*, 326.
2. GRANT OF LAND TO STATES BY ACT OF SEPTEMBER 3d, 1841.—The Act of Congress of September 3d, 1841, is a present grant to each new State, upon its admission into the Union, of five hundred thousand acres of land; but the grant does not attach to any particular parcel of land until the State, through its agents, has selected the same, and the selection has been approved by the United States. *Id.*
3. CONFLICT BETWEEN STATE PATENT AND UNITED STATES PATENT.—When a State has selected any tract of land as a part of the five hundred thousand acres granted by the Act of Congress of September 3d, 1841, and that selection has been made of public lands subject to the grant, and the selection has been approved by the United States, then the State or its grantee holds the title to the tract selected by a title superior to that asserted by the holder of a subsequent patent issued by the United States. *Id.*
4. SURVEY OF PUBLIC LANDS.—The survey of the public lands of the United States into sections and subdivisions of sections can only be made under the authority of Congress, and is beyond the control of the States. *Grogan v. Knight*, 517.

See CONDEMNATION OF LAND, 1, 2, 3, 4, 5; SWAMP AND OVERFLOWED LANDS, 1, 2, 3, 4, 5; EVIDENCE, 10, 11; CONVEYANCE, 1; PRE-EMPTION, 1, 2, 8; SCHOOL LANDS, 1, 2.

LANDLORD AND TENANT.

See TENANT, 1.

LARCENY.

See INDICTMENT, 2.

LEGAL TENDER NOTES.

1. UNITED STATES LEGAL TENDER NOTES.—United States notes issued under and by authority of the Act of Congress of February 25th, 1862, entitled "An Act to authorize the issue of United States notes," etc., and the Act of March 3d, 1863, entitled "An Act to provide ways and means for the support of the Government," are lawful money and a legal tender in payment of all private debts contracted before the passage of said Acts, unless by the terms of the contract creating the debt the debtor promised to pay in gold or silver coin. *Higgins v. B. R. & A. W. & M. Co.*, 158.
2. LAWS MAKING UNITED STATES NOTES LAWFUL MONEY.—The Acts of Congress making United States notes lawful money and a legal tender in payment of debts are not laws operating retrospectively, but ~~the~~ present and prospectively. *Id.*

LEASE.

See PUEBLO LANDS, 1, 2; EVIDENCE, 16.

LEGISLATIVE POWER.

1. POWER OF LEGISLATURE OVER OFFICES.—The incumbent of an administrative office, created by the Legislature, may be legislated out of office pending the term for which he was elected. *People v. Banvard*, 474.

See CONSTITUTIONAL LAW, 1, 2, 3, 4; MUNICIPAL CORPORATION, 1, 3, 4, 5; TAX COLLECTORS, 1.

LICENSE.

See TAX, 2.

LIEN.

1. LIEN OF A JUSTICE'S JUDGMENT ON REAL ESTATE.—A judgment rendered by a Justice of the Peace does not become a lien on the real estate of the judgment debtor until a copy of the judgment, certified by the Justice, has been recorded in the office of the County Recorder. *Bagley v. Ward*, 370.
2. RECORDING OF DOCKET ENTRIES OF A JUSTICE.—The filing and recording in the Recorder's office of the copies of docket entries made by a Justice of the Peace, does not constitute the judgment a lien on the real estate of the judgment debtor. *Id.*
3. LIEN OF CONTRACTOR ON BUILDING.—The statute gives one who has entered into a contract in writing to construct a building a lien on the same as security for the payment of the money becoming due to him according to the terms of the contract, but this lien cannot be enforced for an amount exceeding the sum to become due the contractor. *Dore v. Sellers*, 591.
4. CONTRACTOR HAS NO LIEN EXCEPT FOR MONEY TO BECOME DUE.—If a contractor engages to construct a building in consideration—in whole or in part—of a debt then due from him to the employer, or of a sum paid him by the employer upon the execution of the contract, that portion of the contract price represented by the debt or the advance payment cannot become a lien upon the building. *Id.*
5. LIEN OF EMPLOYEES OF CONTRACTOR.—The employees of the contractor have no lien on the building as principals, and cannot acquire a lien on the building independent of the one existing on the original contract, which they may enforce to the amount due them, so that the same does not exceed the sum for which the contractor has a lien. *Id.*
6. LIEN OF EMPLOYEES OF SUB-CONTRACTOR.—If the contractor has paid the sub-contractor according to the terms of his contract with him, and has not made premature payment, the employees of the sub-contractor are not entitled to demand anything from the contractor or employer. *Id.*
7. SAME.—The employees of the sub-contractor cannot intercept any money due from the employer to the contractor, nor can they enforce the lien of the contractor for any of the same, beyond what is due from the contractor to the sub-contractor at the time. *Id.*

See MORTGAGE, 3; MUNICIPAL CORPORATION, 6; SAN FRANCISCO, 1; HOMESTEAD, 2, 3; EQUITY, 3.

LIMITATIONS, STATUTE OF.

1. STATUTE OF LIMITATIONS IN CASES OF TRUSTS.—If one holds the legal title to land in trust for another, and there is a stipulation that the trustee

shall deed the land to the beneficiary upon the payment of the purchase money and interest to the trustee, a cause of action does not accrue to compel the execution of the trust until the money is paid, nor does the Statute of Limitations commence running until this time. *Millard v. Hathaway*, 145.

2. VOLUNTARY ACCEPTANCE OF MONEY DUE TRUSTEE AFTER IT HAS BEEN DUE FOUR YEARS.—If one holds the legal title to land as security for a sum of money due him by the one having the equitable estate, although the trustee, after the lapse of four years from the time the money falls due, cannot be compelled to accept the money and execute a conveyance, yet, if he voluntarily receives the money when tendered, he is not discharged by the Statute of Limitations from executing the trust and giving a deed to the beneficiary. *Id.*
3. LIMITATION OF ACTIONS IN CASES OF TRUST.—A deposit of money by one with another, to be held by him in trust for the depositor until he shall demand it, constitutes an express continuing trust, and no right of action will accrue to the *cestui que trust* until the trustee assumes a position in hostility to the trust relation, either by refusing to pay the money on demand, or by some other act, nor will the Statute of Limitations commence running until a demand is made for the money, or the trustee has violated his contract. *Schroeder v. Jahns*, 278.
4. SAME.—In such case, if no demand be made on the trustee, and he does not violate his contract in his lifetime, but demand is made on his administrator after his death, the Statute of Limitations does not commence running against the intestate, but the cause of action accrues against the administrator. *Id.*
5. LIMITATION OF ACTION TO SET ASIDE DEED OF INSANE MAN.—If a person, while insane, is fraudulently induced to execute a conveyance of his property to another, the Statute of Limitations will not commence running against the grantor's right to commence an action to set aside the deed, until he recovers his reason and discovers what he has done. *Crowther v. Rowlandson*, 384.
6. STATUTE OF LIMITATIONS — MEXICAN GRANT.—The Statute of Limitations does not commence to run, with regard to lands held under a Mexican or Spanish grant, until a patent for the same has been issued by the Government of the United States. *Reed v. Spicer*, 65.

See PLEADINGS, 1, 2; WATER RIGHTS, 1, 2, 3.

LIS PENDENS.

1. PURCHASERS AFTER *lis pendens* FILED.—If a *lis pendens* is filed at the commencement of an action brought to set aside a deed on the ground of fraud, parties who buy of the defendant pending the litigation are bound by the decree. *Huributt v. Butenop*, 54.

LOST PLEADINGS.

See PRACTICE, 25.

MANDAMUS.

1. MANDAMUS.—The rules of the Civil Practice Act are applicable to pleadings and proceedings in mandamus. *People v. Supervisors of San Francisco*, 665.
2. ANSWERS TO PETITION FOR MANDAMUS AGAINST A BOARD OF SUPERVISORS.—In a proceeding against a Board of Supervisors, in its corporate capacity, to procure a writ of mandate, the answer of one or more than one of the Supervisors in his or their own name or names, whether as Supervisor or otherwise, cannot be regarded as the answer of the Board, and, on motion, will be stricken from the files of the Court. *Id.*

3. **SAME.**—In such case the the answer should be in form the answer of the Board in its aggregate capacity. *Id.*
4. **SAME.**—In such case, if an answer is filed in due form as the answer of the Board, the presumption is that it is the answer of the Board; and the fact that it was sworn to by one member of the Board does not make it his answer, nor is it necessary that such answer should aver that the Board by resolution adopted it. *Id.*
5. **SAME.**—In such case, if two answers are filed, each in form the answer of the Board, the Court may ascertain which is the return of the majority. *Id.*
6. **MOTION FOR JUDGMENT ON PLEADINGS IN MANDAMUS.**—In proceedings to procure a writ of mandate, a motion of the relator for judgment on the pleadings is equivalent to a demurrer to the answer, on the ground that it does not state facts sufficient to constitute a defense to the action. Objections to the answer which are required to be taken by special demurrer, or by motion to strike out, will be disregarded on such motion. *Id.*
7. **APPLICATION FOR MANDAMUS A CIVIL ACTION.**—A proceeding to procure a writ of mandate is a civil action, and the general rules of the Civil Practice Act are applicable to it. *Id.*
8. **JUDGMENT IN MANDAMUS.**—If the relator, in proceedings to procure a writ of mandate, proceeds by petition and notice for a peremptory writ without procuring an alternative writ, the Court may grant any relief consistent with the case made by the petition and embraced within the issues, although it may be only part of that asked in the prayer of the petition. *Id.*

See ELECTION, 1.

MECHANICS' LIEN.

See LIEN, 3, 4, 5, 6, 7.

MERGER.

See JUDGMENT, 9.

MEXICAN GRANT.

1. **FACTS FOUND BEFORE CONFIRMATION OF GRANT.**—The Board of Land Commissioners, or the United States Court, in passing upon and confirming a Mexican or Spanish grant of land, must necessarily find, not only that the alleged grantee was in fact the grantee of the Mexican or Spanish Government, but also that he was competent to take the grant. *Semple v. Hagar*, 168.
2. **A DECREE CONFIRMING A GRANT OF LAND.**—A decree of the Board of Land Commissioners or of a Court of the United States, confirming a Mexican or Spanish grant of land, cannot be attacked in another action, on the ground that the grantee was not competent to take the grant, by reason of having received a grant of more than eleven square leagues of land before he obtained the grant confirmed. *Id.*

See PATENT, 1, 2.

MINING.

1. **PROOF OF MINING FOR GOLD.**—Evidence that a party is at work on a claim, and is mining, and is at work with tools commonly used by miners, is sufficient to justify a jury in finding that he is mining for gold, without any proof that he has found any gold in the claim. *Hill v. Smith*, 480.

See COMMON LAW, 3.

MINING CLAIMS.

See WATER RIGHTS, 4, 5, 6, 7; MINING, 1.

MONEY.

1. HOW PROMISE TO PAY MONEY GENERALLY, SATISFIED.—A promise to pay money generally, can be satisfied by a payment in any kind of currency that becomes lawful money and a legal tender during the interval through which the relation of debtor and creditor shall be extended. *Higgins v. B. E. & A. W. & M. Co.*, 162.
2. DISCRIMINATION BETWEEN KINDS OF MONEY.—Courts cannot discriminate between one kind of money and another in cases where neither the parties contracting nor the laws have made any such discrimination. *Id.*
See LEGAL TENDER NOTES, 1, 2.

MORTGAGE.

1. DECREE IN FORECLOSURE SUIT.—If any of the parties defendant in an action to foreclose a mortgage claim title to the mortgaged premises, or any portion thereof, adversely to the title mortgaged, their rights under such adverse title should be saved in the decree. *Elias v. Verdugo*, 420.
 2. MORTGAGEE'S RIGHT TO AN INJUNCTION.—The mortgagee of a lot on which a house is standing, cannot enjoin the mortgagor or his assigns from removing the house from the lot, except upon proof that the lot without the house will be an inadequate security for the mortgage debt. *Buckout v. Swift*, 424.
 3. SAME.—The severance and removal of a house from land covered by a mortgage withdraws the house from the operation of the mortgage lien; and after the removal the mortgagor or his assignee has a right to sell the house, and the purchaser may convert it to his own use. *Id.*
- See CHATTEL MORTGAGE, 1, 2, 3, 4, 5, 6; PLEDGE, 1; SHERIFF'S SALE, 1; ASSISTANCE, WRIT OF, 1; ESTATES OF DECEASED PERSONS, 1, 2, 4, 5; BAR, 1; EVIDENCE, 19, 20.

MUNICIPAL CORPORATION.

1. STREET IMPROVEMENTS BY A MUNICIPAL GOVERNMENT.—The municipal government of a city, in causing street improvements to be made, acts under the authority conferred upon it by the Legislature, and is subject to all the constitutional limitations and restraints imposed on the Legislature, and has no other or greater power than is and lawfully may be conferred on it by the legislative act. *Oreighton v. Manson*, 618.
2. ASSESSMENT NOT A TAX.—An assessment levied by a municipal government upon lots adjacent to a street to pay for improvements made on the street, if held to be a tax, cannot be maintained, because it lacks the constitutional requirement of equality and uniformity. *Id.*
3. STREET IMPROVEMENTS IN A CITY.—The Legislature has not the power to charge the persons who reside on a street in a city with the expenses of an improvement on that street. *Id.*
4. ASSESSMENT ON LOT FOR IMPROVEMENT OF STREET.—If, under the power to take private property for public uses upon making a just compensation therefor, the Legislature possesses the power to levy an assessment upon lots in a city adjacent to a street to pay for improvements made on the street, the assessment cannot exceed the value of the benefit conferred on

- the lot or its owner by the improvement, and can be enforced only by proceedings to subject the lot to a sale in discharge of the lien. *Id.* 620.
5. SAME.—Such assessment cannot be laid on the lot or its owner when the lot has received only an injury by the work on the street for which the assessment is levied. *Id.*
 6. STATUTE CREATING A LIEN ON A LOT FOR STREET ASSESSMENTS.—A statute creating a lien upon a lot in a city to secure the payment of an assessment levied on the lot for improvements in the street adjacent, must be strictly construed, and the proceedings authorized by the statute to create and enforce the lien must be followed precisely as directed, or the whole proceeding will be void. *Id.*
 7. HOW MUNICIPAL LEGISLATURE CAN ACT.—The legislative department of a city government can act only through the medium of an ordinance, but the ordinance may be in the form of a resolution, or be preceded by the words "Be it ordained," etc. *Id.*
 8. AID TO A RAILROAD BY A MUNICIPAL CORPORATION.—If a municipal corporation has become bound by a vote of its electors, taken under a law of the Legislature, to subscribe to the stock of a railroad company, and pay the amount of its subscription in its bonds, and then makes a compromise with the railroad company by which it agrees to deliver the company a less amount of its bonds in consideration of being released from its subscription, the delivery of this less amount of bonds is not a donation to the railroad company, nor is the fact that the railroad does not touch the city and is not one of local interest, a defense in an action to compel the issuance of the bonds under the compromise. *People v. Supervisors of San Francisco*, 655.
 9. COMPROMISE OF CLAIM AGAINST A CORPORATION.—A municipal corporation, if authorized to do so by law, may compromise a valid claim against it, and the valid claim is a consideration which will support the compromise. *Id.*
 10. PUBLICATION OF AN ORDINANCE.—The publication of an ordinance alone is sufficient to give it validity without a publication of the law authorizing it. All persons are charged with notice of a law on which the ordinance is founded. *Id.*
 11. CONTRACT BETWEEN CORPORATIONS.—A proposition made by some corporate act of a railroad corporation to the authorities of a municipal corporation, and an acceptance of the terms thereof by an ordinance of the municipal corporation, constitutes a contract between them. *Id.*
 12. HOW MUNICIPAL CORPORATION MAY CONTRACT.—A municipal corporation may contract by ordinance, and an ordinance accepting of the terms of a proposition made to the municipality amounts to an assent to the contract on the part of the corporation, and not a mere declaration of intention to enter into a contract. *Id.*

See PLEADINGS, 6; ELECTION, 1.

MURDER.

1. STATUTE DEFINING MURDER IN THE FIRST DEGREE.—The adjectives "wilful" "deliberate," and "premeditated," considered in connection with the context in the phrase "or any other kind of wilful, deliberate, and premeditated killing," found in that section of the Act concerning crimes and punishments defining murder in the first degree, are merely cumulative and expressive of the same ideas. *People v. Poole*, 580.
2. CHARGE TO JURY AS TO THEIR VERDICT.—To charge the jury that they "have the power to find the defendant guilty of murder in the first degree, murder in the second degree, or manslaughter, or not guilty," is the same in effect as to charge them that it is their province so to find. *Id.*

3. **DEFINITION OF MURDER.**—Each of the phrases, "wilful killing," "deliberate killing," and "premeditated killing," standing in relation to the offense of murder, embraces, essentially, the legal idea of the other. *Id.*

See HOMICIDE, 1, 2; INDICTMENT, 2, 3, 4; CRIMINAL CASES, 9, 10.

NEW TRIAL.

1. **MOTION FOR NEW TRIAL.**—If no motion is made for a new trial in the Court below, the findings of the Court and verdict of the jury are conclusive as to the facts. *Allen v. Fennon*, 68.
2. **NEW TRIAL.**—If the evidence is conflicting, a new trial will not be granted on the ground that the findings of the Court are not warranted by the evidence. *Wilcoxon v. Burton*, 232.
3. **NEW TRIAL FOR IRREGULARITY.**—If the Court, after a case is submitted, examines books of account as evidence, which have not been given in evidence during the trial, a new trial will not be granted for this irregularity unless it is stated in the record to be one of the grounds on which the motion will be made. *Id.* 237.
4. **THE PRESUMPTION OF LAW IS THAT THE EVIDENCE WARRANTED THE VERDICT.**—If the jury in their verdict necessarily pass on a material question of fact, the appellate Court will not reverse the judgment on the ground that there was no evidence to warrant the verdict, unless a motion is made for a new trial, and a statement made which shows that no evidence was introduced to prove the fact. The presumption of the law is that there was evidence to sustain every material fact found by the jury. *Doll v. Anderson*, 250.
5. **ORDER GIVING TIME TO FILE STATEMENT.**—An order of Court allowing a party twenty days within which to file a statement on motion for a new trial must be construed as giving twenty days from the date of the order, and not twenty days beyond the time of giving notice, or twenty days beyond the time allowed by statute. *Jenkins v. Frink et al.*, 337.
6. **FILING STATEMENT FOR NEW TRIAL.**—If a statement on application for a new trial is not filed within the time required by law, the right to move for a new trial is waived, and if a motion to that effect is made, the statement should be stricken out. *Id.*
7. **PROCEEDINGS TO OBTAIN A NEW TRIAL.**—There are three distinct steps recognized by the Practice Act, in a proceeding to obtain a new trial, for the taking of each of which, except the last, a particular period of time is allowed: Firstly—a notice of intention to move for a new trial; Secondly—Filing and serving statement or affidavits; Thirdly—The motion for a new trial. An order extending the time for taking either of these steps should express with precision the object to be attained. *Id.*
8. **Query?**—Should an order allowing time within which to file a motion for a new trial be construed as allowing time to file a statement? *Id.*
9. **MOTION FOR NEW TRIAL AFTER REFERENCE.**—If, after the Court has filed its findings of fact, and made an order sending the case to a referee to take and state an account, a motion is made for a new trial, the motion will not stay the proceedings pending before the referee. *Crowther v. Rowlandson*, 385.
10. **WHEN NOTICE TO MOVE FOR NEW TRIAL SHOULD BE GIVEN.**—If the case is tried by the Court, and findings of fact are made and filed, and the case is then sent to a referee to take and state an account, the necessary steps to apply for a new trial should not be taken until the final report of the referee is filed. *Id.*
11. **STATEMENT MUST SPECIFY ERROR.**—On appeal from an order denying a new

trial, the appellate Court will not entertain an objection, however well founded, unless it is specified as an error in the statement. *Id.*

12. DILIGENCE IN MOVING FOR NEW TRIAL.—If a motion for a new trial is not prosecuted with due diligence it should be dismissed on the application of the opposite party. *Eckstein v. Calderwood*, 413.
13. WAIVER OF RIGHT TO MOVE FOR NEW TRIAL.—If a statement prepared on motion for a new trial is not filed within the time prescribed by the one hundred and ninety-fifth section of the Practice Act, the right to move for a new trial is waived, and when such right is thus waived the Court has no power to restore it. *Hegeler v. Henckell*, 491.
14. ORDER GRANTING NEW TRIAL.—If the statement on motion for a new trial is not filed in time, an order granting a new trial for causes appearing in such statement only will be reversed by the appellate Court. *Id.*
15. NEW TRIAL IN CRIMINAL CASE.—The appellate Court will not, in a criminal case, grant a new trial on the ground that the verdict is contrary to the evidence, if the testimony is conflicting. *People v. Brown*, 500.

See PRACTICE, 8, 9, 11, 15, 21, 22.

NONSUIT.

1. MOTION FOR NONSUIT.—A party moving for a nonsuit should state in his motion precisely the grounds upon which he relies, so that the attention of the Court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case. *People v. Banvard*, 474.

NOTICE.

See DEED, 1; CHATTEL MORTGAGE, 4, 5, 6.

OFFICE.

See LEGISLATIVE POWER, 1; TAX COLLECTORS, 1; QUO WARRANTO, 1.

OFFICERS.

See TAX COLLECTORS, 1; LEGISLATIVE POWER, 1.

OUSTER.

See EJECTMENT, 3, 4, 5, 6, 7; TENANTS IN COMMON, 3, 4.

PARTIES.

See CONDEMNATION OF LAND, 2; APPEARANCE IN AN ACTION, 1.

PARTIES TO ACTIONS.

See PARTITION, 5.

PAROL EVIDENCE.

1. EVIDENCE OF INDEBTEDNESS INCLUDED IN A VOLUNTARY JUDGMENT.—If a suit is brought to set aside a judgment confessed voluntarily, on the ground that the same is fraudulent, the parties defendant cannot introduce parol evidence to sustain the judgment, which will show that the statement on which it was rendered was false, nor can they introduce parol evidence of items of indebtedness not only not included in the statement, but by implication excluded from it. *Wilcoxon v. Burton*, 233.

PARTITION.

1. **PARTITION OF WATER.**—Water flowing in a ditch and owned by tenants in common cannot be mechanically partitioned. The only partition which a Court can make, which will definitely and permanently end disputes of tenants in common in water used for mining purposes, is to order a sale and a distribution of the proceeds. *McGillivray v. Evans*, 96.
2. **OBJECT OF A PARTITION OF PROPERTY ITSELF.**—The object of a partition of the property itself among tenants in common, is to enable each party to obtain the title to and the use for all future time, in severalty, of some definite portion of the property owned in common. *Id.*
3. **COMPLAINT IN PARTITION.**—In a complaint to obtain partition of land, a general allegation that "the premises cannot be divided by metes and bounds without prejudice," is sufficient, without an allegation of the facts upon which the plaintiff relies, to obtain a particular mode of partition. *De Uprey v. De Uprey*, 331.
4. **SAME.**—A complaint in partition is good which is silent upon the subject of the mode of partition. *Id.*
5. **PARTIES TO SUIT FOR PARTITION.**—A married woman whose husband is sued in partition is a necessary party if she claims a homestead right to or an interest in the property in dispute. *Id.*
6. **DISCLAIMER IN PARTITION.**—In an action of partition, a defendant cannot claim that the action be dismissed as to him, on the ground that his answer disclaims any interest in the land, unless he has made the disclaimer in absolute and unconditional terms. *Id.*
7. **WHAT MAY BE TRIED IN PARTITION.**—Under our practice, any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in such action. *Id.*
8. **ANSWER IN PARTITION.**—A defendant in partition is not entitled to have the action dismissed by reason of the force and effect of any defense which he may set up in his answer. *Id.*
9. **FACTS TO BE FOUND IN PARTITION.**—In an action for partition, if the Court finds that the parties hold and are in possession of real property, as joint tenants or as tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, the partition should be made, although the findings may also show that the plaintiff, in his complaint, has incorrectly set forth the title or interest of the parties, or of one or more of them, in the land. *Id.*
10. **PAROL PARTITION OF LAND.**—A parol partition of land owned by tenants in common, could be made in California before the adoption of the common law; but the agreement for such partition should be satisfactorily proved, and each tenant in common should have assigned to him and enter upon and possess a specific part of the land in severalty. *Elias v. Verdugo*, 420.

PART PAYMENT.

See JUDGMENT, 16, 17.

PATENT.

1. **JUDICIAL NOTICE OF PROCEEDINGS TO OBTAIN PATENT.**—The Supreme Court will take judicial notice of the fact, that the claimant of land under a Mexican or Spanish grant, presented his petition to the Board of Land Commissioners for the confirmation of his title, and that the same was
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confirmed by said Board, or the District or Supreme Court of the United States, before the patent was issued. *Semple v. Hagar*, 167.

2. **SUIT TO VACATE A PATENT FOR LAND.**—A patent issued by the United States for a confirmed Mexican or Spanish grant will not be vacated by a State Court because the grantee had received a donation of more than eleven square leagues of land from Mexico or Spain before he received the grant confirmed. *Id.*

See LIMITATIONS, STATUTE OF, 1; COMPLAINT, 1; EVIDENCE, 10, 11; LAND, 1, 2, 3.

PERSONAL PROPERTY.

See BUILDINGS, 1; MORTGAGE, 3; CHATTELS, 1, 2, 3.

PLEADINGS.

1. **PLEADING STATUTE OF LIMITATIONS.**—The general allegation in an answer, that the action is barred by the statute prescribing two or any other number of years as the limitation for bringing the action, is not the correct method of pleading the Statute of Limitations. *Schroeder v. Jahns*, 278.
 2. **ANSWER SETTING UP STATUTE OF LIMITATIONS.**—If the complaint in an action against an administrator avers that the intestate received plaintiff's money in his lifetime, to keep the same for plaintiff as the depository thereof until the same should be demanded of him, and that the money remained in the intestate's hands at the time of his death, subject to plaintiff's order, an answer which sets up as a defense that the cause of action did not accrue to plaintiff within two years next before the death of the intestate, and that the same is barred by the Statute of Limitations, does not raise any issue in the case. *Id.*
 3. **DISCLAIMER SHOULD BE ABSOLUTE.**—An answer which disclaims all interest in the land in dispute, except such as the defendant may have under the homestead law, by virtue of the dedication of the land to homestead uses by himself and his wife, is not a disclaimer. *De Uprey v. De Uprey*, 331.
 4. **MATERIAL FACT IN PLEADING.**—A statement in a complaint that the contract sued on was made payable in a specific kind of money is an allegation of a material fact. *Wallace v. Eldredge*, (No. 2,) 498.
 5. **DENIALS IN ANSWER OF ALLEGATIONS OF COMPLAINT.**—If the complaint contains averments of the rendition of a judgment against the defendant by a Court of competent jurisdiction, and states the character of the judgment, an answer denying that the defendant became or was lawfully bound by the judgment, is only a denial of a conclusion of law, and does not raise an issue of fact. If the judgment can be attacked collaterally, the answer must specify the points of its invalidity. *People v. Supervisors of San Francisco*, 655.
 6. **SAME.**—If a complaint avers the passage of an ordinance by a municipal corporation, and the answer in reply states in general terms that the ordinance is illegal and void, no issue of fact is raised. *Id.*
- See DEED, 11; PARTITION, 3, 4, 6, 8; WATER RIGHTS, 3; EVIDENCE, 12; FINDINGS OF FACT, 3; ANSWER, 1, 2; FORCIBLE ENTRY AND DETAINER, 5; PRACTICE, 25; INJUNCTION, 2.

PLEDGE.

1. **SALE OF PERSONAL PROPERTY PLEDGED.**—Personal property pledged to secure a debt may be sold by the pledgee, after the debt to secure which it was pledged has become due, if the sale be made at public auction and after reasonable notice of the time and place of sale be given to the pledgee. *Wison v. Brannan*, 271.

See EVIDENCE, 21.

POSSESSION.

1. OCCUPANCY OF AN ISLAND FOR GATHERING THE EGGS OF WILD BIRDS.—Persons in the casual and temporary occupancy of an island, a part of the public domain, engaged in the pursuit of hunting, fishing, or gathering the eggs of wild birds deposited there, and who do not occupy the land for purposes of husbandry, residence, or commerce, are not in such possession of the same as to entitle them to exclude others who desire to occupy it for a like purpose, or to justify them in resisting by force others who attempt to land upon it to engage in the same pursuit. *People v. Batchelder*, 72.

PRACTICE.

1. ORDERS NOT PART OF JUDGMENT ROLL.—If the appellant desires to have any intermediate orders, not forming a part of the judgment roll, reviewed on an appeal from a judgment, he must bring them into the record by means of a statement, together with such facts forming the basis of the orders as are necessary to explain the action of the Court below. *Harper v. Minor*, 109.
2. STATEMENT ON MOTION FOR A NEW TRIAL.—The office of a statement on motion for new trial is to bring into the record those matters only which arise in the progress of a trial, and constitute the basis of the motion under the fifth, sixth, and seventh subdivisions of section one hundred and ninety-three of the Practice Act, and which the appellant desires to have reviewed on appeal from the order granting or refusing a new trial. *Id.*
3. STATEMENT ON APPEAL.—The office of a statement on appeal is to bring into the record those orders and rulings, together with the facts necessary to explain them, which are made in other stages of the proceedings in the case, and not during the progress of the trial, and not contained in the judgment roll. *Id.*
4. REVIEW OF QUESTIONS OF LAW ARISING DURING THE TRIAL.—An appellant who does not wish to raise any questions in the appellate Court as to the sufficiency of the evidence, may have questions of law arising in the progress of the trial reviewed, by making a statement of such rulings, with sufficient evidence to show their materiality, or may embody them in a bill of exceptions, and in this way have them reviewed on appeal from the judgment. *Id.*
5. WHAT EVIDENCE SHOULD BE CONTAINED IN STATEMENT.—If the appellant insists that the verdict is not supported by the evidence, the statement should state in what particulars it is insufficient, and contain all the evidence on the point or points relied on, but the evidence not bearing upon the point or points relied on is irrelevant. *Id.*
6. ORDERS AND RULINGS IN STATEMENT.—The statement on appeal should contain only such orders and rulings as the appellant desires to have reviewed, and the facts necessary to explain the action of the Court below thereon. *Id.*
7. COSTS OF IRRELEVANT MATTER IN RECORD.—When irrelevant matter to any considerable extent is introduced into the record on appeal, the Supreme Court will visit the party who insisted upon its introduction with the costs of that portion of the record, whether he succeeds upon the merits of the case or not. *Id.*
8. TIME TO GIVE NOTICE OF MOTION FOR A NEW TRIAL.—The District Court has power, without the consent of the parties, upon the application of the party intending to move for a new trial, and upon good cause shown, to extend the time within which to give notice of such motion thirty days beyond the time prescribed by the one hundred and ninety-fifth section of the Practice Act. *Id.*
9. TIME TO FILE STATEMENT ON MOTION FOR NEW TRIAL.—If the time for

- giving notice of motion for a new trial is extended by the Court, the party to whom the extension is given has five days from the time notice is given within which to file his statement, as an absolute right, and the Court has power to extend the time twenty days further. *Id.*
10. **STATEMENT ON APPEAL.**—If the party who appeals from a judgment does not file and serve a statement on appeal within twenty days from the date of the judgment, his right to make a statement is waived. *Id.*
 11. **RECORD ON APPEAL.**—On an appeal from an order dismissing a motion for a new trial, when the only point is as to whether the statement was filed in time, it is not necessary to insert the statement itself in the record. *Id.*
 12. **APPEAL FROM JUDGMENT.**—On an appeal from a judgment, if no errors are assigned in the record, the appellate Court will only review the judgment roll. *Millard v. Hathaway et al.* 187.
 13. **WAIVER OF FAILURE TO FILE STATEMENT AND SERVE NOTICE.**—If the order denying a motion for a new trial states that the motion was submitted upon the statement and affidavits by consent of the respective attorneys, the respondent is precluded in the appellate Court from saying that the statement was not filed in time, or that the notice of intention to move for a new trial was not filed or served. *Id.*
 14. **STATEMENTS AND EXCEPTIONS.**—A statement on motion for new trial, or a bill of exceptions, should contain only so much of the evidence or a reference thereto as may be necessary to explain the grounds specifically set forth as causes for new trial. Judges or Courts, in settling statements, should see that the above rule is complied with. *McMinn v. Wackon*, 319.
 15. **STATEMENT ON APPLICATION FOR NEW TRIAL.**—A statement on application for a new trial, which does not specify the particular errors relied on, or if it is claimed that the evidence is insufficient to warrant the verdict, the particulars in which the evidence is alleged to be insufficient, should be disregarded by the Court. *Burnett v. Pacheco*, 409.
 16. **STATEMENT ON APPEAL.**—A statement on appeal from the judgment, which does not specify the errors relied on, is insufficient. *Id.*
 17. **PLACE FOR ASSIGNMENT OF ERRORS.**—The place for an assignment of errors is in the statement, and not in the notice of appeal. *Id.*
 18. **APPEAL ON JUDGMENT ROLL.**—If there is no statement on appeal, no specification of errors is required. *Id.*
 19. **AGREED STATEMENT OF FACTS.**—If the parties agree to a statement of facts, and stipulate that it may be used by either party in any and all proceedings in the action, the statement of facts becomes a part of the judgment roll. *Id.*
 20. **APPEAL FROM JUDGMENT.**—On an appeal from a judgment, the Court will not review the evidence for the purpose of determining whether the findings of fact are warranted by the evidence. *Burnett v. Pacheco*, 409.
 21. **STATEMENT ON APPLICATION FOR NEW TRIAL.**—If a new trial on the ground of errors occurring at the trial is asked for, the statement should specify the particular errors relied on, and if it does not it should be disregarded by the Court. *Partridge v. San Francisco*, 416.
 22. **ACT GOVERNING STATEMENTS FOR NEW TRIAL.**—The Act of 1863, amending the one hundred and ninety-fifth section of the Practice Act, is the law governing the preparation of statements on motion for new trial made after its passage. *Id.*
 23. **STATEMENT ON APPEAL FROM A JUDGMENT.**—A party who appeals from a judgment or an order, with a statement annexed to the judgment roll,

- must specify particularly in his statement the grounds upon which he intends to rely on the appeal. *People v. Bancord*, 474.
24. **APPEAL FROM A JUDGMENT.**—On an appeal from a judgment, the appellate Court cannot consider the question whether the findings of fact are justified by the evidence. *Id.*
25. **SUPPLYING THE PLACE OF A LOST PLEADING.**—If a pleading in a pending action is lost, its place can only be supplied by motion based upon affidavits showing what the lost pleading contained, and the service of personal notice upon the opposite party of the intention to move, which notice must be sufficiently explicit to advise him of what is intended, as well as to enable him to controvert the affidavits submitted. *People v. Casals*, 522.
26. **MAKING UP TRANSCRIPT ON APPEAL.**—If an amended complaint and answer are filed, and no question arises on the original pleadings, it is not necessary to include them in the transcript on appeal. Other abbreviations of transcript are indicated in the opinion. *Marriner v. Smith*, 649.
27. **SETTLEMENT OF STATEMENT AND AMENDMENTS THERETO.**—The Court should not settle a statement made in support of a motion to set aside a nonsuit which does not specify the errors upon which the moving party will rely, nor should it entertain a motion to amend the same after it has been filed and served on the opposite party. *Levy v. Getteson*, 686.
28. **SAME.**—Such statement should, on motion of the opposite party, be stricken from the files of the Court. *Id.*
29. **STATEMENT ON APPEAL.**—A statement which does not purport to be a statement on appeal, cannot be considered on an appeal from the judgment. *Id.*
30. **APPEAL FROM ORDER REFUSING TO RETAX COSTS.**—An appeal cannot be taken from an order denying a motion to retax costs made before final judgment. *Id.*
31. **SAME.**—An order denying a motion to retax costs should be reviewed by an appeal from the judgment, and annexing a statement to the judgment roll. *Id.*
32. **REVIEW OF ORDER GRANTING NONSUIT.**—The District Court cannot review an order granting a nonsuit upon a motion to set aside the nonsuit. *Id.*
- See JUDGMENT, 2, 3, 4, 5, 6, 7, 11, 12; JURY, 2; NEW TRIAL, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14; SPECIFIC CONTRACT ACT, 2, 3; APPEAL, 1; APPEARANCE IN AN ACTION, 1; SPECIAL VERDICT, 1; CONSOLIDATION OF ACTIONS, 1; MANDAMUS, 1, 7.

PRE-EMPTION.

1. **ENTRY ON INCLOSED PUBLIC LAND TO PRE-EMPT.**—If the defendant in an action to recover the possession of land, justifies his entry upon the prior possession of the plaintiff on the ground that the land was public land, subject to the pre-emption laws of the United States, and that he entered in pursuance of said laws, with intent to pre-empt, occupy, and enter the land in accordance with the provisions of the same, it devolves on him to show that he is one of the persons entitled to the benefit of said laws. *Page v. Hobbs*, 484.
2. **RIGHT TO PRE-EMPT SUSCOL RANCHO.**—A declaratory statement under the pre-emption laws in relation to land within the boundaries of the Suscol Rancho, made by one who was not a *bona fide* purchaser from Vallejo, at any time between March 3d, 1863, and October 15th, 1864, was of no effect. The Act of March 3d, 1863, withdrew said land from the operation of the pre-emption laws until October 15th, 1864. *Id.*
3. **WHAT PRE-EMPTIONER MUST PROVE.**—One claiming to hold public lands as a pre-emptor, as against a prior possessor, must show that he is one of the

class of persons entitled to pre-empt, and that he has performed the acts prescribed by the pre-emption laws, or the prior possession will prevail. *Id.*

See SUSCOL RANCHO, 1, 2.

PREScription.

See WATER RIGHTS, 1, 2, 3.

PROMISSORY NOTES.

1. PURCHASE OF NOTE PAID DUE.—One who purchases a promissory note past due, but which has been paid before the purchase, takes it subject to the defense of payment, even if he was ignorant at the time of his purchase that it had been paid. *Elgin v. Hill*, 373.

See BAR, 1.

PUBLIC LANDS.

See LAND, 1, 2, 3, 4; SCHOOL LANDS, 1, 2.

PUBLICATION OF NOTICE.

See CONDEMNATION OF LAND, 3.

PUEBLO LANDS.

1. POWER TO GRANT OR LEASE PUEBLO LANDS.—Under the Mexican law the power to grant or lease pueblo lands was vested in the municipal authorities; but this power was limited to the granting of house lots for building purposes, and lots two hundred varas square, called *suertes*, for cultivating or planting as gardens, vineyards, orchards, etc. *Redding v. White*, 235.
2. LEASE OF PUEBLO LANDS.—A lease of four hundred acres of pueblo land for ninety-nine years made by the municipal authorities of a pueblo in California in 1847, was void for want of power in the authorities to make the lease. *Id.*

QUO WARRANTO.

1. JUDGMENT IN QUO WARRANTO.—In an action of *quo warranto* to determine the right to an office, where the relator claims the office as against the incumbent, the Court may not only determine the right of the defendant, but of the relator also; and if it determines in favor of the relator, may render judgment that the defendant forthwith deliver up to the relator the office. *People v. Haward*, 474.

RAILROADS.

See CONSTITUTIONAL LAW, 5, 6; MUNICIPAL CORPORATION, 3.

REAL PROPERTY.

See BUILDINGS, 1; MORTGAGE, 3.

RECORDS.

See DEED, 1.

RECORDS OF COURT.

1. POWER OF JUDGE AT CHAMBERS.—A Judge at Chambers has no power to make an order directing the Clerk of his Court to enter in the minutes of

the Court, *nunc pro tunc*, an order alleged to have been made in open Court. *Hegeler v. Henckell*, 491.

2. AMENDMENT OF ENTRIES OF CLERK OF COURT.— Clerical errors and misprisions with respect to entries of judicial proceedings may be corrected by the Court even after the adjournment of the term, but the record itself must show the error. *Id.*
3. ENTRY OF ORDER OF COURT *nunc pro tunc*.—A Court has no power, after the adjournment of a term, to direct the Clerk to enter in the minutes, *nunc pro tunc*, an order made at the adjourned term, where there is nothing in the record to show that such order was made. *Id.*

See PRACTICE, 25.

RECORD OF DEED.

See DEED, 7, 8, 9.

REFEREE.

1. TAKING AN ACCOUNT BY A REFEREE.— If a conveyance is set aside at the suit of the grantor, because of his insanity at the time of its delivery, the account taken under the decree should include such property only as passed into the hands of the grantee under the transfer. *Orowither v. Rowlandson*, 387.

RELEASE.

See CONVEYANCE, 1.

REPLEVIN.

1. ACTION FOR CLAIM AND DELIVERY OF PERSONAL PROPERTY.—The action for the "claim and delivery of personal property" under our practice, is at least commensurate with the action of detinue at common law. *McLaughlin v. Platti*, 464.
2. BILL OF SALE OF PART OF A HERD OF CATTLE.—A bill of sale of a given number of cattle—part of a herd running on the seller's ranch—giving the purchaser the right to select the number sold and take the same immediately, gives to the purchaser the right, after demand and refusal, to recover possession of the entire herd in an action at law, and then select the number purchased, and return the residue to the seller. *Id.*

RES JUDICATA.

See FORMER JUDGMENT IN BAR, 4.

ROADS.

See TOLL ROADS, 1; INJUNCTION, 1, 2, 3.

ROBBERY.

1. ROBBERY.—If the Court in its charge to the jury characterizes the crime of robbery as an "outrage," it is not calculated to prejudice the cause of the defendant, or do him an injury. *People v. Pool*, 572.

See HOMICIDE, 5; CRIMINAL CASES, 11.

SALE OF CHATTELS.

See CHATTELS, 1, 2, 3; REPLEVIN, 2.

SAN FRANCISCO.

1. CONSOLIDATION ACT AS TO STREET IMPROVEMENTS.—The Legislature has not, by the Consolidation Act for the government of San Francisco, and the amendments thereto prior to 1862, done anything more than to provide for a lien upon lots adjacent to a street for improvements made on the street, and define the manner in which the same may be enforced. These Acts do not create any personal liability on the part of the owners of such lots for such improvements, nor does the amendment of 1862 create any personal liability for work done or to be done under contracts entered into before its passage. *Oreighton v. Manson*, 621.
2. RESOLUTION TO GRADE STREET IN SAN FRANCISCO.—A resolution of the Board of Supervisors of the City and County of San Francisco of intention to grade a street, must be presented to the President of the Board for his approval; and if not so presented, no lien can be enforced on the lots adjacent to the street for assessments for grading the same. *Id.*
3. COUNTERSIGNING BONDS OF SAN FRANCISCO TO CENTRAL PACIFIC RAILROAD COMPANY.—The Clerk of the City and County of San Francisco is not in default for not countersigning the bonds required to be issued by the Act of 1863, authorizing said city to subscribe to the capital stock of the Central Pacific Railroad of California, until the Board of Supervisors direct him to countersign the same or afford him an opportunity to do so in their presence, and he refuses. *People v. Supervisors of San Francisco*, 655.

See CORONER, 1.

SAN MATEO COUNTY.

See TOLL ROADS, 1.

SATISFACTION OF JUDGMENT.

See JUDGMENT, 16, 17.

SCHOOL LANDS.

1. SELECTION OF SCHOOL LANDS BY A STATE.—A selection of public lands made by the authorities of a State in lieu of the sixteenth and thirty-sixth sections granted to the State for school purposes, before the lands selected have been surveyed by the United States, and the survey approved, is invalid, and confers no title upon the State. *Grogan v. Knight*, 517.
2. SALE OF UNSURVEYED LANDS BY A STATE.—A sale and certificate of purchase made by a State of lands selected by the State in lieu of the sixteenth and thirty-sixth sections, before the lands thus selected and sold have been surveyed and the survey approved by the United States, confers upon the grantee of the State no title or right of possession. *Id.*

SERVICE OF SUMMONS.

See SUMMONS, 1, 2, 3, 4.

SHERIFF'S SALE.

1. PLAINTIFF PRESUMED TO KNOW DEFECTS IN PROCEEDINGS.—If the plaintiff in an action of foreclosure purchases the property at Sheriff's sale, he is presumed to buy with full knowledge of all defects in the proceedings relating to service of summons. *Steinbach v. Leese*, 297.

SPECIAL VERDICT.

1. **SPECIAL VERDICT OF A JURY.**—It is the province of the Court to determine as to what particular facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question to be submitted to the jury. *American Company v. Bradford*, 384.

See **CRIMINAL CASES**, 5.

SPECIFIC CONTRACT ACT.

1. **SPECIFIC CONTRACT ACT.**—The Act of eighteen hundred and sixty-three, commonly called the "Specific Contract Act," applies to contracts made before as well as after its passage. *Ows v. Haseltine*, 82.
2. **SPECIFIC CONTRACT ACT.**—The Act of April 27th, 1863, commonly called the "Specific Contract Act," does not authorize the rendition of a judgment to be paid and collected in a specific kind of money, except in an action on a contract or obligation in writing made payable in a "specific kind of money or currency," or in an action for the recovery of money received in a fiduciary capacity or to the use of another. *Reed v. Eldredge*, 347.
3. **ACTION ON JUDGMENT RENDERED PRIOR TO APRIL 27TH, 1863.**—In an action upon a judgment rendered prior to the passage of the Act of April 27th, 1863, commonly called the "Specific Contract Act," the Court has no power to annex to the judgment rendered an order or direction specifying the kind of money in which payment must be made in satisfaction of the judgment. *Id.*

See **JUDGMENT**, 7, 12.

SPECIFIC PERFORMANCE.

See **EQUITY**, 1, 2.

STATE COURTS.

1. **JUDGMENTS OF FEDERAL COURTS.**—State Courts cannot set aside or indirectly review the judgments of the Federal Courts made in matters of which the Federal Courts have jurisdiction. *Semple v. Hagar*, 168.

See **PATENT**, 2.

STATE DEBT.

See **CONSTITUTIONAL LAW**, 2, 3.

STATEMENT.

See **PRACTICE**, 2, 3, 4, 5, 6, 9, 10; **NEW TRIAL**, 5, 6.

STATUTORY CONSTRUCTION.

See **LEGAL TENDER NOTES**, 1, 2; **MONEY**, 1, 2; **CONDEMNATION OF LAND**, 1; **MUNICIPAL CORPORATION**, 6.

STREETS.

See **MUNICIPAL CORPORATION**, 1, 2, 3, 4, 5.

SUBSCRIBING WITNESS.

See **DEED**, 10; **EVIDENCE**, 7.

SUPREME COURT.

See **JURISDICTION**, 1.

SUMMONS.

1. **SERVICE OF SUMMONS BY PUBLICATION.**—Where service of summons is had by publication, proof of the publication can only be made by the affidavit of the printer, his foreman, or principal clerk; and the affidavit should state that the person taking the same holds one of these positions. An affidavit commencing in this way: "A. B., principal clerk, etc., * * being sworn, deposes," etc., is insufficient, and would not give the Court jurisdiction of the person of the defendant. *Steinbach v. Leese*, 297.
2. **SERVICE OF SUMMONS BY PUBLICATION.**—When an order is made for the service of summons by publication, and a summons is issued, and a supplemental complaint is afterwards filed and a summons issued thereon, the original action becomes merged in the action as supplemented, and the Court will not acquire jurisdiction of the persons of absent defendants by publication of the original summons; but the summons issued on the supplemental complaint must be served by publication. *McMinn v. Whelan*, 309.
3. **HOW SUMMONS SHOULD BE PUBLISHED.**—If service on a defendant is attempted to be procured by publication, the summons must be published as it was when the order of publication was made. *Id.*
4. **JURISDICTION OF PERSON.**—If jurisdiction of the person of defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued, and in such case there will be no presumption in favor of jurisdiction. *Id.*

See **SHERIFF'S SALE**, 1.

SUSCOL RANCHO.

1. **ACT OF CONGRESS CONCERNING SUSCOL RANCHO.**—The Act of Congress of March 3d, 1863, providing for the survey and sale to the purchasers from Vallejo of the land known as the Suscol Rancho, withdraws said land from the operation of the general laws providing for the disposal of the public lands. *Hastings v. McGoogin*, 86.
2. **SUSCOL RANCHO.**—Prior possession by an inclosure, and a claim made before the Register and Receiver to purchase land, a portion of the so-called Suscol Rancho, within one year from March 3d, 1863, by one who was a *bona fide* purchaser from Vallejo, entitles him to recover in ejectment as against one who enters after March 3d, 1863, and claims the same land under the general pre-emption laws of the United States. *Id.*

See **PRE-EMPTION**, 2.

SWAMP AND OVERFLOWED LANDS.

1. **SWAMP AND OVERFLOWED LANDS.**—The Act of Congress of September 23, 1850, granting to California the swamp and overflowed lands within the State, vested in said State the absolute ownership of all said lands then undisposed of, and the title of the State in no way depends upon the issuance of a patent to the State by the United States. *Kernan v. Griffith*, 88.
2. **SAME.**—The State of California, since the 28th day of September, 1850, has had the absolute power of selling the swamp and overflowed lands within its limits. *Id.*
3. **SAME.**—The Government of the United States has no right to determine by an *ex parte* survey of its own what are and what are not swamp and overflowed lands in this State. *Id.*

4. EVIDENCE AS TO LAND BEING SWAMP OR OVERFLOWED.—One who claims a tract of land under a patent issued to him by this State, conveying the same as swamp land and overflowed land, is not bound, in an action of ejectment brought by him against one claiming under the Homestead Act, by a survey of the United States designating the same as high land, but may introduce evidence of the real character of the land. *Id.*
5. SAME.—The fact, whether a given tract of land is swamp or overflowed, or dry land, cannot be determined by the separate decision of either the State or the United States, but must be settled by evidence given in the course of judicial proceedings. *Id.*

TAX.

1. ASSESSMENT MUST FIX VALUATION ON PROPERTY.—An assessment of town lots for taxation, which does not give their cash valuation either in gross or detail, is radically defective. Figures placed opposite town lots in an assessment roll, without any statement whether they stand for cents, dollars, or eagles, do not fix any valuation to the same. *Hurlbutt v. Butenop*, 54.
2. LICENSE TO DO BUSINESS NOT A TAX.—A license paid to keep a stallion is not a tax upon his assessed value. *Anderson v. Doll*, 607.

See DEED, 2; MUNICIPAL CORPORATION, 2, 4, 5, 6; TAX TITLE, 1.

TAXATION.

See CONSTITUTIONAL LAW, 1.

TAX COLLECTORS.

1. COMPENSATION OF TAX COLLECTORS.—The Legislature has the power to enact a law directing the Collector of Taxes for a county to pay one half of the compensation allowed him by law for the collection of the same into the County Treasury for the benefit of the General Fund. *Solanó County v. Neville*, 468.

TAX DEED.

See DEED, 2; EVIDENCE, 9; TAX TITLE, 1.

TAX TITLE.

1. CLAIMANT OF LAND CANNOT ACQUIRE TAX TITLE.—One who is in possession of land, claiming it as his, when it is assessed for taxes, cannot, by failing to pay the tax and allowing the land to be sold for the same, and becoming the purchaser, and obtaining a Sheriff's deed, acquire a title to it. *McMinn v. Whelan*, 817.

TENANT.

1. DENIAL OF LANDLORD'S TITLE BY TENANT.—If a tenant denies his landlord's title, the denial makes him a trespasser, and he is not entitled to notice to quit before the commencement of an action by the landlord to recover possession of the premises. *Bolton v. Landers*, (No. 1,) 104.

TENANT AT WILL.

See EJECTMENT, 1.

TENANTS IN COMMON.

1. SALE BY TENANTS IN COMMON.—If two persons own a tract of land as tenants in common, and one of them conveys to a third person a ditch crossing the same, and the other afterwards conveys to another third person the same

ditch, the deeds are valid conveyances as between the parties, and the persons to whom the conveyances are made become tenants in common in the property. *Reed v. Spicer*, 61.

2. OCCUPANCY OF COMMON LANDS BY TENANTS IN COMMON.—Tenants in common hold their lands by unity of possession, and each and every of them has the right to enter upon and occupy the whole of the common lands and every part thereof. *Carpentier v. Webster*, 544.
3. POSSESSION OF ONE TENANT IN COMMON.—One tenant in common has no share except that which is undivided, and has no right to exclude his co-tenant from any portion of the common lands. *Id.*
4. DEMAND OF POSSESSION BY CO-TENANT.—A demand made by a tenant in common of a co-tenant in possession to be let into possession of every part of the common lands, is not a notice to the co-tenant in possession to quit. *Id.*

See PARTITION, 2, 9, 10; HOMESTEAD, 1; EJECTMENT, 3, 4, 5, 6, 7.

TESTIMONY.

See TRUST, 2, 3, 4; EVIDENCE, 16, 19, 20.

TITLE.

See TAX TITLE, 1.

TOLL ROADS.

1. TOLL ROAD IN SAN MATEO COUNTY.—The Act of March 24, 1863, entitled "An Act to allow James E. Nuttman, Marcus Harlow, and their associates or assigns to construct a toll road in the County of San Mateo," does not confer upon said Nuttman and Harlow, and their associates or assigns, the right to appropriate the county road then in use in San Mateo County to their use and purposes for such toll road. *Mahoney v. Nuttman*, 343.

TRANSCRIPT.

See PRACTICE, 26.

TRESPASS.

See INJUNCTION, 1, 2, 3.

TREASURER OF STATE.

See JUDGMENT, 3.

TRIAL.

See INSTRUCTIONS TO JURY, 1; CHARGE OF COURT, 1.

TRUST.

1. WHEN TRUST CREATED, AND HOW.—When, on the purchase of property, the conveyance of the legal estate is taken in the name of one person, while the consideration is given or paid by another, a resulting or presumptive trust immediately arises, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds. *Millard v. Hathaway*, 139.
2. IMPLIED TRUST—PROOF OF.—The facts constituting an implied trust can be proved by parol testimony. *Id.*
3. RECITAL IN A DEED.—The recital in a deed that the purchase money of the

property thereby conveyed was paid by the grantee, is not conclusive that such was the fact in an action brought by an alleged *cestui que trust* against the grantee as trustee to establish the trust. The recital may be explained or contradicted by parol testimony. *Id.*

4. **PROOFS IN ACTION TO ESTABLISH IMPLIED TRUST.**—In an action brought to establish an implied trust, on the ground that the deed was executed to one party and the purchase money furnished by another, the party alleging the implied trust must prove clearly that the money belonged to him; and if the testimony is merely parol, it will be received with great caution. *Id.*
5. **STIPULATION OF *Cestui Que* TO REPAY MONEY TO TRUSTEE.**—Where one pays the purchase money, and the deed is executed to another, the law implies a trust, to be executed by a conveyance to the *cestui que*, on demand; and this implied trust is not destroyed because the beneficiary stipulates, in writing, to repay the money, with interest, until paid; and the trust is not to be executed until the money is paid. *Id.*

See LIMITATION, 1, 2, 3, 4; PLEADINGS, 2.

TRUSTEE.

See TRUST, 1.

UNITED STATES COURTS.

See MEXICAN GRANT, 1.

UNITED STATES TREASURY NOTES.

See LEGAL TENDER NOTES, 1, 2; MONEY, 1, 2.

VENUE.

See CRIMINAL PRACTICE, 2; CRIMINAL CASES, 1, 2.

VERDICT.

See NEW TRIAL, 1, 4; SPECIAL VERDICT, 1; CRIMINAL CASES, 5.

WAR.

See CONSTITUTIONAL LAW, 3, 4.

WATER RIGHTS.

1. **ACQUISITION OF RIGHT TO USE WATER BY PRESCRIPTION.**—The use of water in any particular way for a period corresponding to the time limited by statute within which an action must be commenced to determine the right to it, raises a presumption of title to the same in the person enjoying the same as against a right in any other person, which might have been but was not asserted; but in order that this presumption of title may be conclusive, the right to the use of the water must have been asserted under a claim of title with the knowledge and acquiescence of the person having a prior right, and must have been uninterrupted. *American Co. v. Bradford*, 365.
2. **BURDEN OF PROVING RIGHT TO WATER BY ADVERSE USE.**—The burden of proving an adverse uninterrupted use of water for five years, with the knowledge and acquiescence of the person having a prior right, is cast on the party claiming it; and if he leaves it doubtful whether the use was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor. *Id.*

3. **FAILURE TO PLEAD FIVE YEARS ADVERSE USE OF WATER.**—The party claiming a right to the use of water by five years adverse possession, must set up the same as a defense in his answer; and if he does not, he loses the right to introduce evidence in support of it, and to have the Court instruct the jury in relation to it. *Id.*
4. **DECREE ENJOINING USE OF WATER.**—A decree enjoining the owners of a mining claim, situated on a creek below a dam at the head of a ditch, from diverting any water from or in any manner interfering with the waters of the creek that rise above the dam, does not prevent the owners of the mining claim from using the waters of the creek which may flow down the same after the ditch is supplied. *Id.*
5. **MINING ABOVE THE HEAD OF A DITCH.**—Where a ditch has been excavated from the bed of a stream, and its water has been diverted through the same for mining purposes, a miner has no right to work a claim located above its head after the ditch is dug, in such manner as to mingle mud and sediment with the water, and injure its value to the ditch owner for mining purposes, or to fill up the ditch and reservoirs with the same so as to lessen their capacity and increase the expense of cleaning them out. *Hul v. Smith*, 480.
6. **SAME.**—The fact that a miner, working a claim above the head of a ditch, conducts his mining operations in such a manner as to cause the least possible injury to the ditch and water flowing in the same, does not excuse his responsibility for injuries caused by working the same. It matters not how cautiously or carefully the miner works, for if the ditch owner is in fact injured, the miner is none the less liable. *Id.*
7. **USE OF WATER FOR MINING.**—As between ditch owners and miners using the waters of a stream in the mineral region for mining purposes, the law does not tolerate any injury by one to the prior rights of the other. *Id.*
8. **PRIOR AND SUBSEQUENT APPROPRIATORS OF WATER.**—In controversies in the mining regions between the prior and subsequent appropriators of water, the question to be determined is, has the use and enjoyment of the water, for the purposes for which the first appropriator claims it, been impaired by the acts of the subsequent claimant? *Id.*

See PARTITION, 1; COMMON LAW, 3.

WILL.

1. **CONSTRUCTION OF A WILL.**—If by the terms of a will the estate is devised to "A," to have and to hold during his lifetime, and then to go to his heirs; if the word "heirs" is used in a general sense to indicate those to whom by law the property would pass by descent, and not in a special or restrictive sense to designate certain particular individuals, the whole estate vests in "A" in fee simple, notwithstanding the language of the will limits him to a life estate. *Norris v. Hensley*, 442.
2. **IDEM.**—The following was the language of the bequest in the will: "I bequeath to Dr. Van Canaghen, one third of my property on California street, and one third to my son, and one third to my brother, each and all of them to have and to hold their lifetime, and then to go to their heirs and assigns. But never to sell." *Held*, that by the terms of the will, the three devisees named took a fee simple estate in the property devised. *Id.*

WITNESS.

1. **INTERESTED WITNESS.**—One whose interest is equally balanced between plaintiff and defendant is a competent witness. *Elgin v. Hul*, 373.

2. **IMPEACHING A WITNESS.**—Evidence of bad character for chastity is not admissible for the purpose of impeaching the testimony of a witness. *People v. Yslas*, 632.
3. **SAME.**—An inquiry into the character of a witness for the purpose of impeaching his testimony must be restricted to his character for truth and veracity. *Id.*
- CURREY, J.**
4. **IMPEACHMENT OF WITNESS.**—Testimony to impeach a witness should not be confined to his character for truth and veracity, but should extend to his entire moral character, and a witness may be impeached by testimony showing that his general moral character is bad. *Id.*
5. **COMPETENCY OF WITNESS.**—A restriction upon the competency of a witness must be strictly construed in favor of life, liberty, and public justice. *People v. Awa*, 638.
6. **CHINESE WITNESSES.**—A defendant in a criminal case who is a Chinaman is entitled to introduce Chinese witnesses in his behalf. *Id.*
7. *Per SANDERSON, C. J.*—The words “in favor of or against any white person,” in the Act prohibiting persons of one half or more Indian blood, or Mongolian or Chinese, from giving evidence, refer to the defendant alone in a criminal action. *Id.*



CASES NOT REPORTED.

Fowler v. Harbens; order affirmed.

Thornton v. Thompson; judgment affirmed.

Cornwall v. Burning Moscow Gold and Silver Mining Co.; judgment affirmed.

McClelland et al. v. King Solomon Gold and Silver Quartz Mining Co.; judgment affirmed.

Turtin v. Henderson; appeal dismissed.

Quinn v. Kenyon et al.; judgment affirmed.

Jennings v. Polack; judgment affirmed.

Jones et al. v. Frost; judgment modified by deducting therefrom twenty dollars and eighty-five cents of the costs, and affirmed as modified.

Steiner v. American Falls Mining Co.; judgment reversed.

People v. Waterman et al.; judgment reversed and new trial granted.

Jewett v. Adkinson; judgment reversed and new trial granted.

Frisbie v. Marquez; judgment reversed and new trial granted.

Decker v. Hughes; judgment affirmed.

McKown v. Beatty et al.; order affirmed on the authority of *Higgins v. Bear River and Auburn Water and Mining Co.*, ante, 153.

Davis v. Mitchell; judgment affirmed.

Higgins v. Bear River and Auburn Water and Mining Co., (No. 2.); order affirmed on authority of same case, ante, 153.

Gruff v. Rohrer; order affirmed on the authority of *Higgins v. The Bear River and Auburn Water and Mining Co.*, ante, 153.

Kernan v. Allen; judgment reversed on the authority of *Kernan v. Griffith*, ante, 87.

Coddington v. Hopkins et al.; judgment affirmed.

Thomas v. His Creditors; judgment reversed and new trial ordered.

Kimball v. Wilbur et al., (*Semple, Intervenor*); judgment affirmed.

Burton et al v. Covarrubias; order reversed on authority of *People v. De La Guerra*, 24 Cal. 73.

CASES AFFIRMED.

Wolf v. Fleischacker, 5 Cal. 244; *Reynolds v. Pixley*, 6 Cal. 167; and *Kellersberger v. Kopp*, 6 Cal. 565; in *Elias v. Ver-lugo et al.*, ante, 418.

Summers v. Dickenson, 9 Cal. 554, in *Kernan v. Griffith*, ante, 87.

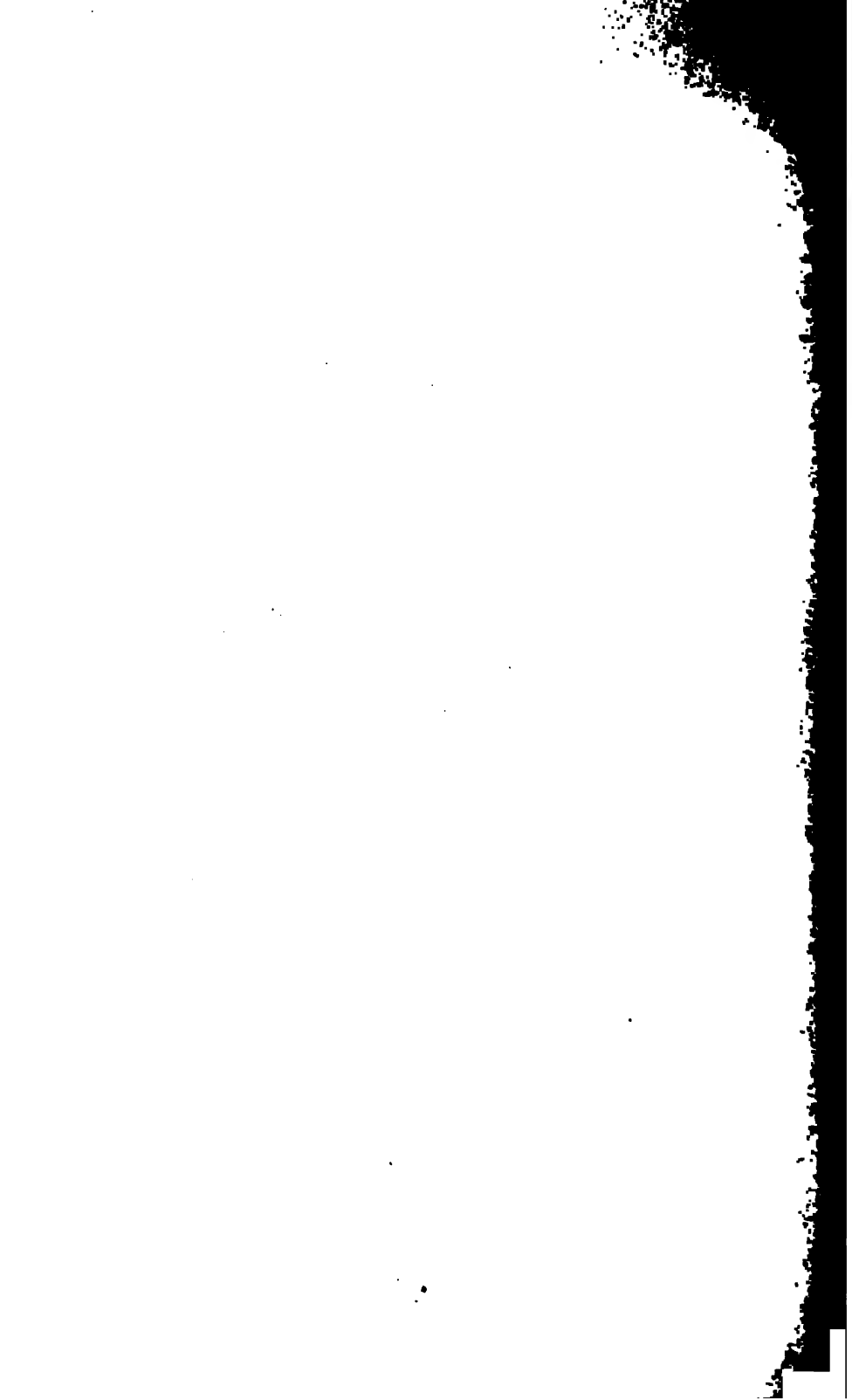
CASE OVERRULED.

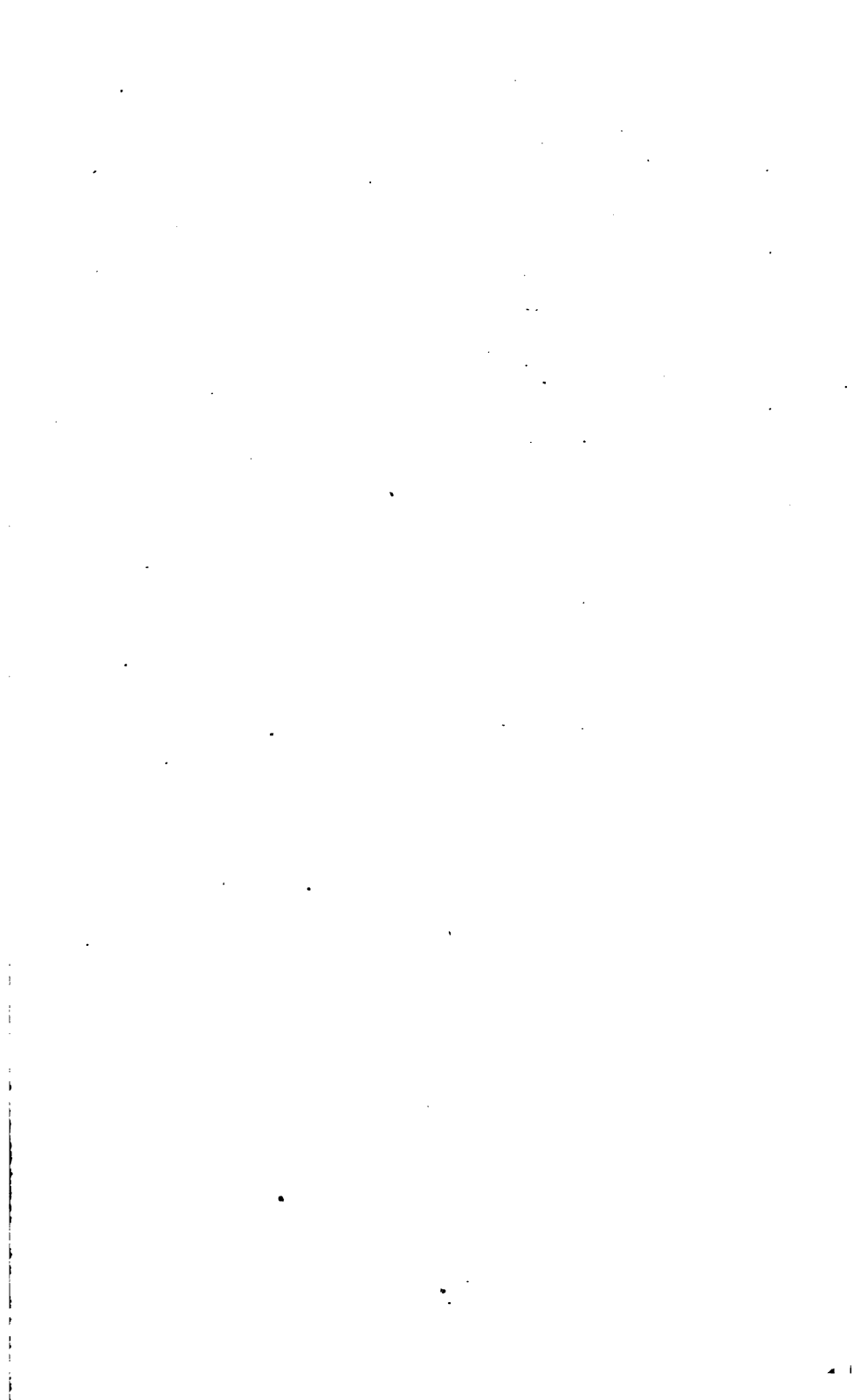
Benedict v. Cozens, 4 Cal. 381, in *People v. Cazalis*, ante, 522.













VOLUME XXVII.

By WILLIAM FOSTER.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

27 Cal. 11-49; 85 Am. Dec. 211. **HOOPER v. WELLS, FARGO & CO.**

Forwarders are responsible for ordinary care, skill, and diligence. They are not, it is true, insurers, like common carriers, but they are responsible for all injuries to property while in their charge, resulting from negligence or misfeasance of themselves, their agents, or employees, p. 27.

Cited in *Alabama Co. v. Thomas*, 89 Ala. 302, 18 Am. St. Rep. 123, holding that a forwarder is liable as a bailee for lack of ordinary care; *Overland Co. v. Carroll*, 7 Colo. 50, holding an express company liable for neglect of its agent in failing to seal a valuable package; note to 88 Am. Dec. 418, on forwarders; and in notes, on common carriers as insurers, in 91 Am. Dec. 363; 93 Am. Dec. 106; 99 Am. Dec. 586.

Limitation of Liability, by an express company in its contracts for forwarding, must be construed most strongly against the company; and a stipulation, that the company are "not to be responsible except as forwarders," does not relieve the company from liability for loss of the goods, while in transit, by negligence of their agents. The fact that defendants made use of various public conveyances, their messenger with the treasure traveling a part of the way by stage, a part by steam tug and lighters, and a part by ocean steamer, makes no difference as to their liability. For defendant's purposes the managers of those various conveyances were their agents and employees, pp. 28-30.

Cited in *California Powder Works v. Atlantic & Pacific Co.*, 113 Cal. 336, holding that where a shipping order stipulated that a railway company should not be liable for loss by fire, the company was not liable for such loss occurring without negligence of its employees; *Bank v. Adams etc. Co.*, 1 Flipp. 253, Fed. Cas. No. 889, but distinguished, holding express company liable for ordinary care only under stipulation of contract; *The Queen*, 61 Fed. 218, construing stipulation for presentation of claims; notes to *Bullard v. Express Co.*, 61 Am. St.

Rep. 363, 364, 365, and Pittsburgh etc. Co. v. Mahoney, 62 Am. St. Rep. 525, on general subject; Alabama Co. v. Little, 71 Ala. 616, holding that a limitation of liability by a railway company did not release it from responsibility for damage caused by lack of ordinary care; Grace v. Adams Express Co., 100 Mass. 506, 97 Am. Dec. 118, 1 Am. Rep. 133, holding that where an express company stipulated against liability for loss by dangers of navigation and fire, it was not liable for loss by fire at sea; McLean v. Burbank, 11 Minn. 291, where a stage company was held liable for the death of a passenger on a ferryboat that was carrying the stage; Christenson v. American Express Co., 15 Minn. 286, 2 Am. Rep. 129, holding that an express company, that had limited its liability to that of a forwarder, was liable for a loss caused by negligence of employees of a steamer; to same effect, as to loss by fire on a steamer, in the United States Express Co. v. Bachman, 28 Ohio St. 151; American Express Co. v. Second Nat. Bank, 69 Pa. St. 402, 8 Am. Rep. 272, holding an express company not liable for loss of money in the hands of a connecting company, there being no negligence on the part of the first company; Ballou v. Earle, 17 R. I. 445, 33 Am. St. Rep. 885, where an express company's receipt limited its liability to fifty dollars unless a higher value was declared therein, and it was held for a loss occasioned by the company's negligence, there could be no recovery beyond fifty dollars, because the actual value of the goods had not been declared; and in Galveston Co. v. Allison, 59 Tex. 198, where a railway agreed that melons should go through to their destination in the same car, and a connecting road put them in another car, and the first road was held liable for damage caused thereby, notwithstanding it had limited its liability to loss occurring on its own line. Approved in Bank of Kentucky v. Adams Express Co., 93 U. S. 186, holding the company liable for loss of money in a railway accident. Distinguished in Harding v. International Navigation Co., 12 Fed. Rep. 170, holding that where a railway company issued a through bill of lading stipulating against liability for loss on any line but its own, it was not liable for damage on a connecting line. Cited in Milne v. Douglas, 13 Fed. Rep. 39, holding that where several railway companies signed a bill of lading stipulating that only the company on whose road a loss occurred should be liable for it, the companies were jointly liable for a loss; also in notes, on limitation of liability by a common carrier, in 32 Am. Dec. 497, 500; 50 Am. Dec. 666; 55 Am. Dec. 345; 62 Am. Dec. 130; 82 Am. Dec. 295, 379; 88 Am. Dec. 765; 92 Am. Dec. 56, 610; 93 Am. Dec. 73, 107; 94 Am. Dec. 566; 97 Am. Dec. 182; 13 Am. St. Rep. 783; note on liability of express companies in 91 Am. Dec. 789; note on liability for connecting carriers in 89 Am. Dec. 163; note on contracts by agents in 9 Am. St. Rep. 795; and in note, on master and servant, in 22 Am. St. Rep. 461.

Amendment in Appellate Court.—Where the complaint alleges damages in a definite sum, and the verdict is for a larger sum, to include

interest, it is too late, on appeal, to amend the complaint to make it correspond to the verdict, though it might have been done before judgment in the lower court, p. 35.

Cited in *Farmer's Bank v. Stover*, 60 Cal. 396, holding it error not to have allowed an answer to be amended in the lower court; to the same effect in *Burns v. Scoofy*, 98 Cal. 276, notwithstanding that allowing the amendment would have necessitated a continuance; and in notes to 89 Am. Dec. 337, and 95 Am. Dec. 557, on amendment after appeal.

Interest.—Where a complaint prays for a certain sum as damages, and the verdict is for a larger sum, to include interest, the excess over the amount prayed for must be struck off by the respondent, or judgment will be reversed, p. 35.

Distinguished in *Cassacia v. Phoenix Co.*, 28 Cal. 631, holding that where the complaint prayed for judgment for a certain amount "and for such other and further relief as may seem meet," and the verdict included interest, this was "consistent with the case made, and embraced within the issues."

27 Cal. 50-57. **HURLBUTT v. BUTENOP.**

Certified Copy of Recorded Instrument held admissible, where party offering it testified that he "never had control of the original," p. 55.

Cited in *Mayo v. Mazeaux*, 38 Cal. 449, holding that the instrument must have been duly recorded, and that an objection to insufficiency of evidence as to its control must be raised at the time, or be deemed waived.

Lis Pendens having been filed at the beginning of a suit, purchasers from defendant, pending the suit, are bound by the decree, p. 56.

Cited in *Sharp v. Lumley*, 34 Cal. 615, holding that the object of filing a *lis pendens* "being to afford notice, actual notice must certainly be as effectual as constructive notice under the statute. We can perceive no good reason why a party taking an interest in a tract of land pending a proceeding to foreclose a mortgage upon it, with actual notice of the action, should not be bound by the judgment, although no notice of *lis pendens* had been filed"; *Amador Co. v. Michell*, 59 Cal. 178, holding that a purchaser at a judicial sale with notice of pendency of a foreclosure suit on the property, is bound by the judgment therein; and in note to 56 Am. St. Rep. 857, on *lis pendens*.

Valuation in Assessment-roll is defective where it is expressed in figures without indicating for what they stand, p. 57.

Affirmed in *Braly v. Seaman*, 30 Cal. 619; *People v. San Francisco Savings Union*, 31 Cal. 135; and *Emeric v. Alvarado*, 90 Cal. 467. Distinguished in *Dyke v. Bank*, 90 Cal. 401, holding that a judgment was properly docketed where numerals were written without the dollar

mark in the column headed "amount of judgment," and the ruling of the column plainly indicating that the figures to the left were dollars and those to the right were cents, and, "when so written not only courts, but all persons of common education, readily read and understand the figures as representing a definite number of dollars and cents." Cited in *Hopper v. Lucas*, 86 Ind. 51, holding that a transcript from a justice's docket, where the amount of judgment was expressed in figures without a dollar mark, was not evidence of the amount. Denied in *Ward v. Commissioners*, 12 Mont. 34, holding, as to an assessment roll, that "the omission of the dollar mark, when the position of the figures, the value of the property, or some other fact, indicates the meaning of the numerals in said exhibit, is an informality which does not vitiate the assessment." Cited in *Morrill v. Taylor*, 6 Neb. 244, holding that the statute regulating an assessment must be strictly complied with. Affirmed in *Tilton v. Oregon Central Co.*, 3 Sawy. 24; and *Gray v. Larriamore*, 4 Sawy. 652; 2 Abb. U. S. 558; also in *In re Boyd*, 4 Sawy. 286, as to a judgment docket of a superior court.

27 Cal. 57-65. REED v. SPICER.

False Description in a deed must be rejected, p. 63.

Affirmed in *Reamer v. Nesmith*, 34 Cal. 627, and *People v. Blake*, 60 Cal. 509. Cited in *Terry v. Berry*, 13 Nev. 524, holding that parol evidence is admissible to ascertain whether a description is false, and if false it must be rejected; also in note on this point in 30 Am. Dec. 735.

Ejectment.—Deed of a mining ditch held to be of the ditch itself; for if it were only of an easement or incorporeal hereditament, ejectment would not lie, p. 63.

Affirmed in *Integral Co. v. Altoona Co.*, 75 Fed. Rep. 383; *Ada Co. etc. Co. v. Farmers' etc. Co.*, 5 Idaho, 799, action to establish right to possession of right of way on public domain over which to divert water may be maintained without first acquiring right to divert water; note on easements in 11 Am. Dec. 663.

Deeds by Cotenants, of a ditch in the common land, held to be good between the parties, and to constitute the grantees cotenants with the grantors, p. 64.

Cited in *Meagher v. Hardenbrook*, 11 Mont. 389, holding that appropriators of water from a stream through a ditch were cotenants, and one of them could preserve his right to the water to such an extent as he could use it; and in *Holbrook v. Bowman*, 62 N. H. 321, holding that a deed by a tenant in common was good against his cotenants, so far as it operated without prejudice to them.

Statute of Limitations, as to a mining ditch, begins to run only from the date of the issuance of a patent therefor, p. 65.

Cited in *Bissell v. Henshaw*, 1 Sawy. 559, 560, holding that ejectment

on a Mexican grant may be brought within five years from the final confirmation thereof by the United States.

27 Cal. 65-68. PEOPLE v. BLACKWELL.

Presentment of Indictment in proper form will be presumed, where the record shows nothing to the contrary, p. 67.

Cited in *Collins v. State*, 13 Fla. 657, holding that the record sufficiently showed that defendant was properly indicted; and in *Bass v. State*, 17 Fla. 689, holding that objection to the form of filing an indictment cannot be raised for the first time on appeal.

Special Counsel for Prosecution may be allowed in the discretion of the court, on request of the district attorney, p. 67.

Affirmed in *Wood v. State*, 92 Ind. 271, *Tull v. State*, 99 Ind. 239, and Approved in *State v. Tighe*, 27 Mont. 333, all following rule.

Prosecuting Witness may be asked if he employed special counsel to prosecute, p. 68.

Cited in *People v. Lee Au Chuck*, 66 Cal. 667, holding that questions to the prosecuting witness as to his bias must be allowed, "unless it could be said as a matter of law, that they had no tendency, if answered in the affirmative, to show bias on the part of the witness." Affirmed in *People v. Gillis*, 97 Cal. 543.

27 Cal. 68-69. ALLEN v. FENNON.

Appeal from Judgment.—Where no motion for new trial has been made, the findings of the court and verdict of the jury are conclusive as to the facts, p. 69.

Affirmed in *Green v. Butler*, 26 Cal. 599, saying: "The practice is the same in all cases, whether at law or in equity"; also in *People v. Banvard*, 27 Cal. 475. Cited in *Doe v. Vallejo*, 29 Cal. 391, to the point that there is no distinction between law and equity in this respect. Affirmed in *Hihn v. Peck*, 30 Cal. 287. Cited in *Carpentier v. Small*, 35 Cal. 359, holding that the judgment cannot be modified to suit the facts, as to do this "would be substantially to disregard the finding of the district court and substitute a new finding of our own in its place," and a new trial must be granted. Affirmed in *Federico v. Hancock*, 1 Ariz. 512. Cited in *Burbank v. Rivers*, 20 Nev. 84, to the point that the same rule applies in equity; and in *Silva v. Pickard*, 14 Utah, 254, holding that insufficiency of the evidence to justify the findings is no ground for reversal of an equity decree.

27 Cal. 69-80; 85 Am. Dec. 231. PEOPLE v. BATCHELDER.

Self-defense.—An instruction, that if defendant was "attacked with deadly weapons and murderous intent by the deceased, and his life
Notes Cal. Rep.—85

placed in immediate danger, he was not obliged to retreat, but might stand his ground and, if need be, kill his assailant," held proper under the circumstances, p. 75.

Affirmed in *People v. Macard*, 73 Mich. 22. Cited in notes, on this point, in 91 Am. Dec. 760; 92 Am. Dec. 422; 100 Am. Dec. 181; and 24 Am. St. Rep. 294.

27 Cal. 80-84. OTIS v. HASELTINE.

Statute of Frauds.—Promise to indorse a note, written on the back of a contract for sale of goods, before sale and delivery, held to be a sufficient compliance with the statutory requirement that in such case there must be a note in writing, expressing the consideration for the promise, p. 84.

Cited in *Bagley v. Cohen*, 121 Cal. 606, construing section 2808, Civil Code, and holding guarantors absolutely liable on principal's default; *Ford v. Hendricks*, 34 Cal. 675, to the point that "the promise of a guarantor is not within the statute of frauds, if made before the delivery of the note"; and to same effect in *Howland v. Aitch*, 38 Cal. 135, 136. Cited in notes to 87 Am. Dec. 126, and 60 Am. St. Rep. 437.

27 Cal. 84-87. HASTINGS v. McGOOGIN.

Pre-emption of Suscol Rancho.—The act of Congress of 1863 withdraws the lands of the Suscol Rancho from the operation of the general laws providing for the disposal of the public lands, p. 87.

Affirmed in *Page v. Hobbs*, 27 Cal. 487; *Page v. Fowler*, 28 Cal. 609; *People v. Shearer*, 30 Cal. 650; *Hutton v. Frisbee*, 37 Cal. 490, 491, 502, 503.

27 Cal. 87-91. KERNAN (ALIAS KERMAN) v. GRIFFITH.

Grant of Swamp Lands to the state, by the act of Congress of 1850, operated "as a full and perfect conveyance in praesenti"; and a patent, issued later to the state, would have no operation except by way of further assurance, p. 89.

Cited in *Megerle v. Ashe*, 27 Cal. 327, to the point that "a legislative grant is as effectual to pass the title to lands, in all respects and for every purpose, as a grant evidenced by a patent." Affirmed in *Sherman v. Buick*, 45 Cal. 668. Cited in *Tubbs v. Wilhoit*, 73 Cal. 63, to the point that "the provision made for a patent in the second section (of the act of 1850) is for the purpose of furnishing to the grantee documentary evidence that the land was swamp and overflowed, and a further assurance of title." Affirmed in *GrosLouis v. Northcut*, 3 Oreg. 397, 399; *Blakesly v. Caywood*, 4 Oreg. 288; *Gaston v. Stott*, 4 Oreg. 57, 58; *Miller v. Tobin*, 16 Oreg. 542. Cited in *Wells v. Pennington Co.*, 2 S. Dak. 9, 39 Am. St. Rep. 763, holding that an act of Congress, as to highways over public lands, was a grant in praesenti,

and settlers on the lands thereafter took them subject to the right of way. In *Wright v. Roseberry*, 121 U. S. 504, Field, J., says, after citing the principal case and others: "The result of these decisions is that the grant of 1850 is one in praesenti, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but where that officer has neglected or failed to make the identification, it is competent for the grantees of the state, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object." Affirmed by Field, J., in *San Francisco Savings Union v. Irwin*, 11 Sawy. 870; 28 Fed. Rep. 710.

Swamp Lands.—The question whether lands in dispute were "swamp and overflowed," at the date of the act of 1850, must always be responded to by the jury on evidence submitted to them and applicable to the question, p. 91.

Affirmed in *Thornton v. Thompson*, 28 Cal. 603, 87 Am. Dec. 78, and *Robinson v. Forrest*, 29 Cal. 319, 322. Cited in *Keeran v. Griffith*, 31 Cal. 464, saying that "the question whether a given subdivision of land is within the act will remain a question of fact, to be determined not upon official certificates, but upon evidence that would be competent to prove the fact if it arose in issue upon a conveyance between private persons. And we do not undertake to say that the action of the two governments in that behalf will preclude a person claiming under either government, by right of title having its origin previous to such action, from showing the truth as to the character of the land claimed by him." Cited in *Keeran v. Allen*, 33 Cal. 545, holding that swamp lands must be "unfit for cultivation." Affirmed in *Keeran v. Griffith*, 34 Cal. 584, and *Read v. Caruthers*, 47 Cal. 182. Denied in *French v. Fyan*, 93 U. S. 172, where Miller, J., says: "With all the respect we have for that learned court, we are unable to concur in the views therein expressed"; and holds that a United States patent for swamp lands cannot be contradicted by parol evidence to show that the lands were never "swamp and overflowed."

27 Cal. 92-99. **McGILLIVRAY v. EVANS.**

Partition of Water Rights in a mining ditch can be made only by sale of the ditch and distribution of the proceeds, p. 98.

Affirmed in *Lorenz v. Jacobs*, 59 Cal. 263. Cited in *Lenfers v. Henke*, 73 Ill. 411, 24 Am. Rep. 267, holding that a dower interest in mines could not be assigned except by the sale of the mines and division of proceeds; to same effect, as to partition of a spring and aqueduct, in *Allard v. Carleton*, 64 N. H. 25; also, as to partition of a water right, in *Brown v. Cooper*, 98 Iowa, 455; 60 Am. St. Rep. 197. Cited in *Head*

v. Amoskeag Co., 113 U. S. 211, to the point that "water rights held in common, incapable of partition at law, may be the subject of partition in equity, either by apportioning the time and extent of use or by a sale of the right and a division of the proceeds."

27 Cal. 99-104. **LAMPING v. HYATT.**

Judgment by Default cannot grant any greater relief than is demanded in the prayer of the complaint and specified in the summons, p. 102.

Distinguished in *Lane v. Gluckauf*, 28 Cal. 294, 87 Am. Dec. 124, saying: "Where judgment is by default, the court cannot grant greater relief than is demanded in the complaint; but where there is a trial, the court may grant any relief consistent with the case made in the complaint and embraced within the issue." Cited in *Ellis v. Rademacher*, 125 Cal. 557, noted under *Raun v. Reynolds*, 11 Cal. 19; *Gautier v. English*, 29 Cal. 168, holding that where judgment by default was entered for the sum demanded in the complaint, and interest thereon at the rate demanded, it was error to add that the judgment should bear interest at the same rate, because the complaint did not demand it; also, in *Bond v. Pacheco*, 30 Cal. 535, holding that where the clerk of the court, in entering judgment by default, included too much interest by mistake, it was "an error committed in the performance of an act within his jurisdiction to perform, which could be corrected on motion made in time, or on appeal, but which would not vitiate the judgment if not corrected. There is no want of jurisdiction over the subject-matter but only an error in its exercise." Affirmed in *Lowe v. Turner*, 1 Idaho, 112. Cited in *Bank v. Dyer*, 14 Wash. St. 283, holding that a judgment for foreclosure of a mortgage could not also include a personal judgment for deficiency, because the complaint did not ask for such relief; and in *Wilbur v. Maynard*, 6 Colo. 488, holding that judgment by default on a note should be only against a wife, where the complaint joined her husband but asked for no relief against him.

Judgment for Money, "to be enforced and collected in gold coin," is erroneous, where the complaint and summons do not specify any particular kind of money, but the note sued on stipulated that if it was not paid in gold, the maker should pay the difference between gold coin and paper currency, p. 103.

Distinguished in *Lane v. Gluckauf*, 28 Cal. 292, 87 Am. Dec. 122, where the intent of a contract, for payment in gold coin or its equivalent in currency at current rates, was held to be to compel payment in gold coin, and a judgment for gold coin was held to be proper; also, in *Reese v. Stearns*, 29 Cal. 275, holding that where a judgment was for "U. S. gold coin or its equivalent," those words must be stricken out, saying: "In contemplation of law, a dollar in legal tender notes is equal to, and therefore the equivalent of, a dollar in gold coin." Cited

in *Hazard v. Cole*, 1 Idaho, 287, holding that a judgment for gold coin was not void but irregular, and might have been modified on motion in the lower court, or by appeal; and in note on this point to 87 Am. Dec. 126.

Judgment cannot be rendered against defendants who were served, but were not named in the complaint or summons, p. 104.

Cited in *King v. Randlett*, 33 Cal. 322, holding that where a suit was brought in justice's court against the Independent Company, summons was issued against the Independent Tunnel Company and served on a member of the Independent Company, a judgment against the Independent Tunnel Company was void.

N. B.—The principal case is referred to in *Johnson v. Lamping*, 34 Cal. 298, which is a subsequent phase of the same transaction, on other points.

27 Cal. 104-106. **BOLTON v. LANDERS**. S. C. 26 Cal. 393.

Tenant, who denies landlord's title, in a suit between them, becomes a trespasser, and is not entitled to notice to quit, p. 105.

Cited, as an illustration, in dissenting opinion in *Campbell v. Jones*, 38 Cal. 512, a majority of the court holding that in an action for unlawful detention of personal property the complaint must allege a demand before suit. Affirmed in *Simpson v. Applegate*, 75 Cal. 345, and *McCarthy v. Brown*, 113 Cal. 20. Cited in note to 42 Am. Dec. 134, on notice to quit.

Pendency of Another Suit held no ground for abatement, for "although the same questions are litigated in both, the relief sought is different, p. 106.

Affirmed in *Coles v. Yorks*, 31 Minn. 215, holding that an action to foreclose a mortgage was not barred by the pendency of a suit in ejectment; and in note on this point in 84 Am. Dec. 456.

27 Cal. 106-107. **BOLTON v. LANDERS**.

Jurisdiction of the supreme court being of cases where the amount in dispute exceeds two hundred dollars, a judgment for two hundred dollars and costs cannot be reviewed, for "costs constitute no part of the matter in dispute," p. 107.

Referred to in *Dashiell v. Slingerland*, 60 Cal. 657, where under a constitutional limit of jurisdiction to three hundred dollars, the amount sued for being nine hundred dollars, and a recovery being only for two hundred dollars, it was held that the supreme court had jurisdiction, for the amount sued for was the test of jurisdiction. Affirmed in *Payne v. Davis*, 2 Mont. 381.

27 Cal. 107-115. **HARPER v. MINOR**.

Judgment-roll.—On an appeal from the judgment, where there is

no statement, Supreme Court only considers matters appearing in the judgment-roll. A referee's report, and clerk's minutes, form no part of the judgment-roll, p. 109.

Affirmed as to clerk's minutes, in *More v. Del Valle*, 28 Cal. 174, and *People v. Empire Co.*, 33 Cal. 173. Cited in *Batchelder v. Baker*, 79 Cal. 267, holding that where the appeal is on the judgment-roll, the court cannot look outside of it; *Lee Sack Sam v. Gray*, 104 Cal. 246, to point that report of a referee, and testimony, are no part of the judgment-roll; *Wood v. Nissen*, 2 N. Dak. 30, holding that a stenographer's transcript of proceedings and evidence is not a bill of exceptions or statement; *Hecla etc. Co. v. Gisborn*, 21 Utah, 75, noted under *Dawley v. Hovious*, 23 Cal. 103; *Zeile v. Moritz*, 1 Utah, 285, holding that a judgment on demurrer can be reviewed on appeal without a statement or bill of exceptions.

Intermediate Orders do not form part of the judgment-roll, but the appellant "must, by means of a statement on appeal, bring them into the record, together with such facts, forming the basis of the orders, as are necessary to explain the action of the court below," p. 109.

Affirmed in *Abbott v. Douglass*, 28 Cal. 299, by Sawyer, J., dissenting on other points; also, in *Wetherbee v. Carroll*, 33 Cal. 554, and *Sutter v. San Francisco*, 36 Cal. 114; and in *McClelland v. Dickenson*, 2 Utah, 107. Cited in *Spence v. Scott*, 97 Cal. 182, to the point that an order striking out part of an answer cannot be reviewed "without a bill of exceptions"; and to same effect in *Graham v. Linehan*, 1 Idaho, 781.

Statement on Appeal is for the purpose of bringing into the record orders and rulings, with the facts necessary to explain them, that do not arise during the progress of the trial, and are not contained in the motion for new trial or judgment-roll; also, if the appellant from an order refusing a new trial desires only a review of rulings of law during the trial, he may introduce such rulings upon questions of law, with sufficient evidence to point them, into his statement on appeal, or make a bill of exceptions, p. 110.

Approved in dissenting opinion of Sawyer, J., in *Quivey v. Gambert*, 32 Cal. 322. Cited in *Sharp v. Daugney*, 33 Cal. 515, holding that objections to legal sufficiency of an affidavit and order of publication must be raised by motion made in the action, or on an appeal supported by a statement; *Treadwell v. Davis*, 34 Cal. 605, 94 Am. Dec. 772, saying: "There is no controversy as to any material fact, and the action of the court below is sought to be reviewed on questions of law alone. In such cases a statement on appeal is not only a proper method, but is often the most convenient, expeditious, and economical mode of bringing the alleged errors before this court." Cited in *Gates v. Walker*, 35 Cal. 290, where an appeal was dismissed for lack of statement and judgment-roll, the court declining to refer to the record of another appeal by other parties in the same case, in the absence of a stipulation;

and *Cooper v. Pac. M. Co.*, 7 Nev. 121, holding that objections to rulings of law at the trial should be brought up by statement on appeal or bill of exceptions.

Statement on Motion for New Trial is for the purpose of bringing into the record matters arising during the trial that the appellant wishes reviewed, p. 110.

Affirmed in *Graham v. Stewart*, 68 Cal. 376. Referred to in *Quivey v. Gambert*, 32 Cal. 305, holding that an order striking out a statement is not appealable, and saying that though such appeal was allowed in the principal case, the point was not made, "and it escaped our notice"; *Sawyer, J.*, dissenting, on page 327.

Costs may be imposed on a prevailing party, for introducing irrelevant matter into a statement on appeal or motion for new trial, p. 111.

Cited as an illustration in dissenting opinion in *Quivey v. Gambert*, 32 Cal. 316. Affirmed in *Stark v. Hill*, 31 Mo. App. 109.

Notice of Intention to move for a new trial must be filed and served within the statutory time, subject to the court's power to extend the time as the statute provides, pp. 112-114.

Affirmed in *Cottle v. Leitch*, 43 Cal. 321, 322.

Statement on Motion for New Trial must be filed within five days after service of notice of intention, unless the court extends the time as provided by statute, p. 114.

Affirmed in *Stevens v. Northwestern Co.*, 1 Idaho, 605.

Statement on Appeal, not filed and served within the statutory time, held properly stricken out, p. 115.

Cited in *Kavanagh v. Maus*, 28 Cal. 262, holding that a statement was not served in time. Approved in dissenting opinion of *Sawyer, J.*, in *Quivey v. Gambert*, 32 Cal. 325. Cited in *Cody v. Filley*, 4 Colo. 437, holding that where a statement was filed on the last statutory day, service of it on the next day was invalid; and in *First Nat. Bank v. Irvine*, 2 Mont. 556, holding that where an appeal was from the judgment and also from the refusal of a new trial, and the statement was filed too late for the first, but in time for the second, it did not operate as a waiver of any rights.

Statement, on motion for new trial, need not itself be included in the statement on appeal from the order of refusal, where the only question is not as to the sufficiency or character of the statement, but as to whether or not it was filed in time, p. 115.

Approved in dissenting opinion of *Sawyer, J.*, in *Quivey v. Gambert*, 32 Cal. 315.

27 Cal. 119-148. **MILLARD v. HATHAWAY.**

Waiver.—Where an order refusing a new trial recites that the motion

was submitted on a statement by consent of counsel, the respondent is precluded from saying that the statement was not filed in time, p. 138.

Cited in *Meredith v. Santa Clara Assn.*, 60 Cal. 620, holding that sureties to an undertaking on appeal waived their right to object to the jurisdiction of the court by signing the undertaking; and in note to 76 Am. Dec. 467, on this point.

Resulting Trust arises where a deed is made to one person, but the consideration is paid by another. These trusts are expressly exempted from the operation of the statute of frauds, p. 139.

Affirmed in *Sandfoss v. Jones*, 35 Cal. 487. Cited in *Case v. Coddington*, 38 Cal. 193, holding that if "the one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party, pro tanto. The party setting up the trust must show that the money was paid by him at or before the execution of the conveyance"; to the same effect in *Roberts v. Ware*, 40 Cal. 637; *Walton v. Karnes*, 67 Cal. 256; and *Tripp v. Duane*, 74 Cal. 91; *Savings etc. Soc. v. Davidson*, 97 Fed 712, noted under *Hidden v. Jordan*, 21 Cal. 92; *O'Connor v. Irvine*, 74 Cal. 439, holding that a purchaser of land at a tax sale held it in trust for the owner, who furnished the money to buy it in; *Hellman v. Messmer*, 75 Cal. 170, to the point that the consideration "may have been paid by the party who took the title, but advanced as a loan to the other party, and if so, a trust results"; and to same effect in *Thomas v. Jameson*, 77 Cal. 93; *Broder v. Conklin*, 77 Cal. 338, holding that an attorney who bid in property, at a sale by the assignee of an insolvent, for the benefit of the insolvent and his creditors, held it in trust for them. Affirmed in *Riley v. Martinelli*, 97 Cal. 580, 33 Am. St. Rep. 211. Cited in *Warren v. Adams*, 19 Colo. 522, holding that a trust results from acts; dissenting opinion in *Towle v. Wadsworth*, 147 Ill. 99, a majority of the court holding that the statute of frauds is no defense; *Lyons v. Bodenhamer*, 7 Kan. 478, holding that one who borrows a land warrant, settles on and improves the land without any claim by the owner, becomes the beneficiary of a resulting trust; *Tenny v. Sampson*, 37 Kan. 363, 365, to the point that the consideration need not come directly from the beneficiary; dissenting opinion in *Grumley v. Webb*, 48 Mo. 596, a majority of the court holding that accord and satisfaction had been made of plaintiff's claim to an equitable interest in lands, based on his furnishing money for their purchase. Cited in *Mannix v. Purcell*, 46 Ohio St. 143, 15 Am. St. Rep. 576, saying: "The distinction between resulting trusts and trusts for charitable or pious uses is almost as clear and as broad as that between legal and equitable estates. . . . A resulting trust is to be performed or executed by the trustee by transferring the title of the cestui que trust at his request"; and in *Chenoweth v. Lewis*, 9 Oreg. 152, holding that an agreement, for sale of an interest in land acquired under a resulting trust, must be in writing under the statute.

Findings cannot be altogether detached from each other and considered piecemeal. If a particular finding be doubtful or obscure, reference may be had to the context for the purpose of ascertaining the true meaning, p. 141.

Affirmed in *Alhambra Co. v. Richardson*, 72 Cal. 604, remarking that "the counsel treats the findings as if they were dug up from the ruins of ancient cities at different epochs." Cited in *Patent Brick Co. v. Moore*, 75 Cal. 211, saying that an assignment "is pleaded in the same language as that of the findings, and this is sufficient." Affirmed in *Mott v. Ewing*, 90 Cal. 235, and *Barnes v. Sabrom*, 10 Nev. 248.

Parol Evidence is admissible to explain or contradict a recital in a deed as to payment of consideration; if the evidence is merely parol, it will be received with great caution, and the court will look anxiously for some corroborating circumstances to support it, p. 142.

Affirmed in *Duffy v. Duffy*, 104 Cal. 607, and *Dalton v. Dalton*, 14 Nev. 428; *Brooks v. Union Trust etc. Co.*, 146 Cal. 137, parol evidence is admissible to establish resulting trust in realty arising under Civil Code § 853, though money consideration recited which was not in fact paid by trustees.

Statute of Limitations.—Where a trustee under a resulting trust agrees to convey land to the beneficiary upon payment by the latter of the purchase price and interest, the statute does not begin to run until such payment is made, pp. 145, 146.

Cited in *Day v. Cohn*, 65 Cal. 509, holding that where a vendee under a contract of sale remained in possession, paying installments of the purchase price, and the last of such payments was made two years before bringing of suit by him to enforce the contract, his equitable right to compel performance of it was not barred by the statute of limitations; note to 85 Am. Dec. 78.

27 Cal. 151-152. **PEOPLE v. COUNTY JUDGE.**

Prohibition will lie to prevent a county judge from punishing contempt against a district court, p. 152.

Cited in *Huerstal v. Muir*, 62 Cal. 481, holding that an order adjudging one guilty of contempt cannot be appealed from "simply on the ground that the record shows want of jurisdiction to render the judgment," but certiorari is the proper remedy; also in *Phillips v. Welch*, 12 Nev. 177, where, on certiorari to review a judgment punishing for contempt, the court said that where the lower court "acquired jurisdiction of the subject-matter and of the person of the petitioner, this court has no jurisdiction either on appeal, writ of error, habeas corpus, or certiorari"; *People v. Carrington*, 5 Utah, 532, holding that prohibition lies against a commissioner of the supreme court to prevent his inflicting a punishment for libel, certiorari and habeas corpus not being adequate or

speedy remedies; *State v. Circuit Court*, 97 Wis. 15, 65 Am. St. Rep. 98, awarding writ to terminate improper contempt proceedings; *In re Litchfield*, 13 Fed. Rep. 869, holding that one court cannot punish a contempt against another; and in note to 12 Am. Dec. 184, on contempt.

27 Cal. 153-163. **HIGGINS v. BEAR RIVER CO.**

Legal Tender Act is valid, p. 162.

Affirmed in *Belloc v. Davis*, 38 Cal. 254, 255. Cited in note to 87 Am. Dec. 126.

27 Cal. 163-170. **SEMPLE v. HAGAR.**

Fraud must be specifically alleged, p. 166.

Affirmed in *Kent v. Snyder*, 30 Cal. 674; *Green v. Hayes*, 70 Cal. 281; dissenting opinion in *Spring Valley v. San Francisco*, 82 Cal. 321, 16 Am. St. Rep. 34; *Leavenworth Co. v. Commissioners*, 18 Kan. 178; *Parley's Park Co. v. Kerr*, 3 Utah, 246; *United States v. Tichenor*, 8 Sawy. 154; 12 Fed. Rep. 425. Cited in note to 25 Am. Dec. 96.

Judicial Notice is taken as to the statutory procedure required on the part of a claimant under a Mexican grant, p. 167.

Cited in *United States v. Williams*, 6 Mont. 389, taking judicial notice of the rules of the interior department as to timber on public lands; and in notes to 11 Am. Dec. 781, and 89 Am. Dec. 690, on judicial notice.

Patent on a Mexican Grant cannot be issued until the grant has been confirmed by the land commissioner or the federal courts; and the decisions of federal courts on this point cannot be attacked collaterally by the state courts, p. 170.

Cited in *Botiller v. Dominguez*, 130 U. S. 255, where Miller, J., says: "There can be no doubt of the proposition that no title to land in California dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to and confirmed by the board provided for that purpose in the act of 1851, or, if rejected by that board, confirmed by the district or supreme court of the United States." Cited also on this point in *Hagar v. Lucas*, 29 Cal. 311, 312; *Bernal v. Lynch*, 36 Cal. 143, and *Yates v. Smith*, 40 Cal. 668.

27 Cal. 171-175. **STANFORD v. WORN.**

Condemnation of Land.—Provisions of the statute must be strictly followed. The power must be exercised precisely as directed, and there can be no departure from the mode prescribed without vitiating the entire proceedings, p. 174.

Cited in *Smith v. Davis*, 30 Cal. 537, to same effect as regards a street assessment; dissenting opinion in *Appeals of Houghton*, 42 Cal. 68, as an example of special proceedings where an appeal was allowed, though the statute did not provide for it. Affirmed in *Godchaux v. Car-*

penter, 19 Nev. 418, and Pettis v. Providence, 11 R. I. 375. Cited in note to 73 Am. Dec. 584.

Publication of Notice must be for the period prescribed by the statute, p. 174.

Affirmed in State v. Tucker, 32 Mo. App. 629, and Leonard v. Sparks, 63 Mo. App. 596.

27 Cal. 175-228. **PEOPLE v. PACHECO.**

Appropriation for payment of coupons on Pacific Railway bonds is not a debt or liability within the meaning of article 8 of the constitution, limiting the amount of the state debt, pp. 207-221.

Cited in Bickerdike v. State, 144 Cal. 695, construing and sustaining coyote bounty acts; State v. City, 24 Mont. 529, quoting City v. Edwards, 84 Ill. 626. Distinguished in Eaton v. Mininaugh, 43 Or. 476, holding void an act requiring election for selection of county seat and directing county clerk to issue warrants to pay cost of constructing new courthouse if new location selected and to levy tax to pay off such warrants; Napa Valley Co. v. Board of Supervisors, 30 Cal. 439, to the point that the legislature may appropriate funds for aid of a railway; also in Carr v. State, 127 Ind. 209, 22 Am. St. Rep. 628, holding that the question of making an appropriation is for the legislature. Disapproved in Coulson v. Portland, Deady, 498, saying: "I have never been able to bring my mind to assent to the reasoning by which the court arrived at the conclusion that the act in question did not create a debt"; and holding that an appropriation for erection of public buildings, to be paid for by issuance of bonds, was void; in Pleasant Valley Co. v. County Commrs., 15 Utah, 166, holding that salaries not due until the first of January should not be included in an appropriation for December. Cited, also, in the following cases (for which see note, ante, to State v. McCauley, 15 Cal. 429), viz.: 9 Colo. 411; 84 Ill. 631; 87 Ill. 409, 422; 97 Ind. 11; 49 Am. Rep. 424; 127 Mo. 641; 48 Am. St. Rep. 600; 6 Mont. 540; 5 Nev. 26; 5 Oreg. 34, 35; 26 Oreg. 246, 247; 6 S. Dak. 522; 55 Am. St. Rep. 855; 7 S. Dak. 9; 14 Wash. St. 63; 35 West Va. 619.

Power of Taxation is vested in the legislature, and that power is unlimited, p. 209.

Affirmed in Emery v. San Francisco Gas Co., 28 Cal. 355. Cited in Chapman v. Morris, 28 Cal. 395, holding that the legislature could authorize interest to be paid on deferred county warrants.

27 Cal. 228-238; 87 Am. Dec. 66. **WILCOXSON v. BURTON.**

New Trial is not granted on the ground that the evidence does not support the findings, where the evidence is conflicting, p. 232.

Cited in notes to 93 Am. Dec. 409, 3 Am. St. Rep. 579; 7 Am. St. Rep. 201.

Confession of Judgment by a debtor without the knowledge of his creditor, and for a greater amount than is actually due, is void, p. 235.

Cited in *Anderson v. Bank*, 140 Cal. 698, sustaining action by creditor on behalf of himself and other creditors to set aside such judgment; *Tully v. Harloe*, 35 Cal. 308, 95 Am. Dec. 105, holding that "a mortgage knowingly and intentionally given and taken for a larger amount than is due, and not as security for future advances, is fraudulent as against the other creditors of the mortgagor"; if given for future advances, "it must show upon its face the utmost amount intended to be secured, but it need not show whether that amount represents an existing debt or future advances." Cited, also, in *Lee v. Figg*, 37 Cal. 336, 99 Am. Dec. 274, holding that a judgment by confession, though fraudulent against creditors, "is valid till vacated upon a direct proceeding for the purpose"; *Pond v. Davenport*, 44 Cal. 487, holding that though a confession of judgment was defective for failure to set forth sufficient facts as to the indebtedness, yet the presumption of fraud thereby arising was successfully rebutted by evidence. Cited in *Lowenstein v. Caruth*, 59 Ark. 592, holding that a confession of judgment without the knowledge of the creditor estops neither party from denying anything set forth in it, but the creditor may ratify it so far as he can do so without affecting rights under intermediate attachments; *Swain v. Gilder*, 61 Miss. 672, holding a confession of judgment void, because there was no plaintiff; *Mendes v. Freiters*, 16 Nev. 397, holding that where the amount named in a complaint and attachment was in excess of what was actually due, but plaintiff acted in good faith, the judgment was not void but good as to the actual indebtedness, as against subsequent attaching creditors; *Beazley v. Sims*, 81 Va. 648, holding that a valid confession of judgment has all the attributes of other judgments; and in notes on this point to 65 Am. Dec. 522; 99 Am. Dec. 276; 4 Am. St. Rep. 659; 11 Am. St. Rep. 821; 12 Am. St. Rep. 659; 45 Am. St. Rep. 810.

Estoppel.—Where an answer averred a certain amount and nature of indebtedness, defendant was held thereby estopped from proving a different amount and nature, p. 236.

Cited in notes to 22 Am. St. Rep. 781, and 36 Am. St. Rep. 245, on estoppel by pleadings.

27 Cal. 238-248. **McMINN v. O'CONNOR.**

Certified Copy of deed, that had been improperly recorded because not legally acknowledged, is evidence, if the existence of the original is proven, p. 245.

Cited in *Mayo v. Mazeaux*, 38 Cal. 449, to the point that "a certified copy of an instrument duly recorded may be read in evidence without proof of the original, if it be shown to the satisfaction of the court that the original is not under the control of the party"; also in *Cannon v.*

Deming, 3 S. Dak. 429, holding that where the statute requires that an instrument must be acknowledged before being recorded, recording it without acknowledgment is not constructive notice of its contents.

Execution of Deed in a foreign country, improperly acknowledged, may be proved without producing the attesting witness or proving his handwriting, p. 245.

Affirmed in **McMinn v. Whelan**, 27 Cal. 310.

Jurisdiction over the Person of defendant appearing never to have been acquired in a case of ejectment, the judgment-roll therein is not evidence of title, p. 246.

Cited in **Forbes v. Hyde**, 31 Cal. 348, to the point that "when it appears in the record that the court has no jurisdiction of the person of the defendant against whom judgment is rendered, the judgment may be collaterally attacked."

After-acquired Title by defendant is ejectment must be pleaded by supplemental answer, p. 247.

Affirmed in **Moss v. Shear**, 30 Cal. 473; **Calderwood v. Pyser**, 31 Cal. 336; **Bagley v. Ward**, 37 Cal. 129, 153; 99 Am. Dec. 259, 270; **Reily v. Lancaster**, 39 Cal. 356; **McLane v. Bovee**, 35 Wis. 35.

Sheriff's Certificate of Sale of land on execution is not evidence for defendant in ejectment; if the time for redemption had not expired, the evidence was wholly incompetent to establish any right in the defendants, either legal or equitable; if the time for redemption had passed, the defendants should have obtained their deed, p. 248.

Cited in **Pollard v. Harlow**, 138 Cal. 392, but held inapplicable under later Code provisions; **Page v. Rogers**, 31 Cal. 301, to the point that the legal title does not pass to the purchaser until the delivery of the sheriff's deed; also in note on sheriff's deed in 15 Am. Dec. 252.

Amendments are in discretion of the court, p. 248.

Cited in note to 34 Am. Dec. 158.

27 Cal. 248-253. **DOLL v. ANDERSON.**

Statement on Appeal failing to include evidence on a point, the presumption is that the fact was sufficiently proven to warrant the verdict, p. 252.

Cited in **Frevert v. Swift**, 19 Nev. 402, holding that where questions as to evidence are not specified in the statement, they will not be considered on appeal.

Notice of Assignment of contract by defendant held to have been given to plaintiff, and the effect of failure to give it not decided, p. 252.

Cited in **Hogan v. Black**, 66 Cal. 42, to the point that plaintiff's as-

signee must notify defendant of the assignment or have himself substituted as plaintiff.

27 Cal. 253-255. FRISBIE v. PRICE.

Notice to Quit is necessary to give a right of action against a tenant at will, p. 255.

Cited in *Simpson v. Applegate*, 75 Cal. 345, holding that where a tenant at will denied the tenancy, notice to quit was not necessary before bringing suit; *Pomeroy v. Bell*, 118 Cal. 638, holding that a vendee under a contract of sale "is sometimes termed a quasi tenant at will for the purpose of recovering possession by the vendor; . . . he has been held in some cases entitled to a demand for possession before his holding can be deemed unlawful"; *Treadway v. Sharon*, 7 Nev. 48, holding that where a license to occupy is determinable by a mere demand, notice to quit is not necessary; and in note to 42 Am. Dec. 129.

27 Cal. 255-258; 87 Am. Dec. 75. HALL v. AUBURN CO.

Officers of a Corporation have no power to authorize the execution of a note as surety for another, in respect to a matter having no relation to the corporate business, and in which the corporation has no interest, p. 257.

Cited in *Melone v. Ruffino*, 129 Cal. 523, 524, as referred to in a later case; *Hall v. Crandall*, 29 Cal. 568; note to *In re Assignment etc. Co.*, 70 Am. St. Rep. 164, on ultra vires. Affirmed in *Hall v. Crandall*, 29 Cal. 570, 572, 89 Am. Dec. 65, 66, holding that neither were the officers liable personally, for "it is clear upon inspection of the instrument that the defendants intended to bind the company and not themselves, and that the plaintiffs so understood it." Cited in *Chamberlain v. Pacific Wool Co.*, 54 Cal. 106, holding that a note signed by the president of a corporation, describing himself as such, was his personal note and not the corporation's. Distinguished in *Seeley v. San Jose Co.*, 59 Cal. 24, holding that the president of a lumber company had power to borrow money to carry on the business of the corporation. Cited in *National Bank v. German American Co.*, 116 N. Y. 292, holding that a corporation had no power to indorse an accommodation note; *Park Hotel Co. v. First Nat. Bank*, 86 Fed. Rep. 747, holding that the president of a corporation had no power to make a note of the corporation payable to himself, and get it discounted for his own use; *Lyon v. First Nat. Bank*, 85 Fed. Rep. 122, to the point that "it is ultra vires of a commercial corporation and its officers to make accommodation paper, or to guarantee the payment of the obligations of others"; and in notes to 90 Am. Dec. 644, and 31 Am. St. Rep. 753, 754.

27 Cal. 258-273. WILSON v. BRANNAN.

Chattel Mortgage and Pledge.—Chattels mortgaged or pledged may be

sold by the creditor after the debt is due, at public sale, after reasonable notice to the debtor, pp. 270, 271.

Cited in *Heyland v. Badger*, 35 Cal. 411, holding that "in the case of a pledge the title remains in the pledgor, but in the case of a chattel mortgage, whether possession of the chattel be delivered to the mortgagee or not, the title passes to the mortgagee, subject to be defeated upon performance of the condition, and in case of a breach it becomes absolute at law in the mortgagee"; *Wright v. Ross*, 36 Cal. 429, to the point that "the pledgee may have the property sold for the payment of the debt secured by it, after calling upon the pledgor to redeem, by a judicial decree, or he may himself sell the property after due notice to the owner"; *Everett v. Buchanan*, 2 Dak. 263, holding that where a mortgagee of chattels sold them at private sale contrary to the terms of the mortgage, it was a conversion and extinguished the mortgage title; *Lee v. Fox*, 113 Ind. 102, holding that if possession has been taken, the equity of redemption may be foreclosed by a sale on due notice; *Bryant v. Carson Co.*, 3 Nev. 318, 93 Am. Dec. 407, holding that a statute regarding foreclosure does not deprive the mortgagee of the right to sell without action, on due notice; *Blackburn v. Selma Co.*, 3 Fed. Rep. 699, holding that where a decree requires a sale to be confirmed in order to bar equity of redemption, the sale is not complete without it; notes to 45 Am. Dec. 447, and 51 Am. Dec. 313, on chattel mortgage; note to 75 Am. Dec. 710, on notice of sale; and notes to 79 Am. Dec. 501, and 32 Am. St. Rep. 730, on pledge.

General Citation.—*Meeker v. Waldron*, 62 Neb. 697.

27 Cal. 274-282. **SCHROEDER v. JAHNS.**

Statute of Limitations.—An averment in an answer that the suit is barred by the statute is not a statement of a fact but of a conclusion of law, p. 278.

Affirmed in *Table Mountain Co. v. Stranahan*, 31 Cal. 393. *Spaulding v. Howard*, 121 Cal. 197, noted under *Caulfield v. Saunders*, 17 Cal. 571.

Continuing Trust.—If the trustee has not, by act or declaration, manifested a determination to repudiate the trust and violate the contract under which the money came to his hands, there must be a demand by the cestui que trust for the money, and a refusal, before he is liable to an action for the money. The statute of limitations, therefore, would not commence to run in such case unless the demand was made, p. 280.

Affirmed in *Roach v. Caraffa*, 85 Cal. 446, and *Millet v. Bradbury*, 109 Cal. 176. Distinguished in *Bills v. Silver King Co.*, 106 Cal. 23, holding that a claim by an administratrix for dividends on mining shares was barred in two years from date of the claim, on account of laches of plaintiff in making demand.

Defective Finding, that does no harm, is not cause for reversal of judgment, p. 282.

Cited in *Tage v. Alberts*, 2 Idaho, 252, holding that if findings are sufficient to sustain the judgment, failure to find upon certain allegations of the complaint is not ground for new trial.

27 Cal. 282-287. **REDDING v. WHITE.**

Pueblo Lands.—Leases by the municipal authorities of five hundred acre tracts for nearly a thousand years, at a rent of only three dollars per annum, were void, p. 287.

Cited in *Holladay v. San Francisco*, 124 Cal. 356, and *City of Monterey v. Jacks*, 139 Cal. 551, noted under *Hart v. Burnett*, 15 Cal. 568; *San Francisco v. Canavan*, 42 Cal. 556, to the point "that in respect to pueblo lands it is competent for the legislature to control and direct how they shall be managed and controlled or disposed of by the municipal corporation."

27 Cal. 287-295. **PEOPLE v. SKIDMORE.**

Former Judgment is a bar when cause tried on merits irrespective of ground on which judgment was based, p. 293.

Cited in *Town v. Pomeroy*, 111 Wis. 671, holding prior judgment a bar under facts stated.

27 Cal. 295-299. **STEINBACH v. LEESE.**

Affidavit of Publication of summons in a newspaper must aver that the affiant is one of the persons authorized by statute to make it, p. 298.

Cited in *Sharp v. Daugney*, 33 Cal. 514, holding that an affidavit by the "publisher and proprietor" of a paper was a sufficient compliance with the statute; *Hahn v. Kelly*, 34 Cal. 419, 428, 94 Am. Dec. 760, holding that where the affidavit did not aver the position of the affiant, but the judgment stated that service had been made according to law and the order of the court, the presumption was "that proof of publication by the proper person was in fact made." Cited in *McChesney v. People*, 174 Ill. 49, holding mere recital of status of affiant insufficient; *Scott v. Brackett*, 89 Ind. 418, holding that notice of petition for location of a ditch must be advertised as prescribed by the statute. Affirmed in *Odell v. Campbell*, 9 Oreg. 306. Cited to the point that service by publication must strictly comply with the statute, in *Cissell v. Pulaski Co.*, 3 McCrary, 449, 10 Fed. Rep. 893, and *Martin v. Barbour*, 34 Fed. Rep. 708; also in *Gray v. Larrimore*, 4 Sawy. 646, 2 Abb. U. S. 551, where Field, J., holds that evidence is inadmissible to supply omissions in an affidavit of publication, saying: "The statute prescribes the character of the evidence which shall be produced and by whom it shall be given. It is not sufficient that other proof equally persuasive and convincing may be offered. The statutory proof will alone suffice"; and in note to 42 Am. Dec. 63, on this point.

Appearance by defendant is when he answers, demurs, or files notice of appearance; service of this notice should antedate or be contemporaneous with the service of all other notices and papers; notices, the purpose of which is "not to give notice of appearance but to give notice of a step taken or about to be taken," are not included in the statutory definition, p. 299.

Cited in *Glidden v. Packard*, 28 Cal. 651, holding that notice of motion to dissolve attachment is not such an appearance as authorizes the clerk to enter judgment by default; *Coombs v. Parish*, 6 Colo. 297, holding that defendant may enter a special appearance for the purpose of making a motion to dismiss. Denied in *Curtis v. McCullough*, 3 Nev. 213, holding that a statute prescribing what shall constitute an appearance does not preclude appearance in a different manner for other purposes, and saying that a different rule, "so manifestly against the universal practice of all courts, should not be adopted, except upon the most unequivocal language of the statute." Cited in *McCoy v. Bell*, 1 Wash. St. 510, holding that the personal presence of defendant is not an appearance; "some act must be performed; he must answer, demur, or give the plaintiff written notice, or, if an attorney appears, he must give notice of appearance."

Notice of defects in publication is presumed where plaintiff is himself the purchaser at sheriff's sale on foreclosure, p. 299.

Affirmed in *Plummer v. Whitney*, 33 Minn. 428, as to sale on execution.

27 Cal. 300-322. **McMINN v. WHELAN.**

Attesting Witness to Foreign Deed is presumed to be out of the court's jurisdiction at the trial, p. 310.

Cited in note to 33 Am. Dec. 723.

Publication of Summons.—The statute must be strictly complied with, p. 314.

Affirmed, as to publication of notice of locating a ditch, in *Vizzard v. Taylor*, 97 Ind. 94; also, as to publication of summons and attachment, in *Stewart v. Anderson*, 70 Tex. 601; *Park v. Higbee*, 6 Utah, 416, noted under *Ricketson v. Richardson*, 26 Cal. 152; note to *Miller v. White*, 76 Am. St. Rep. 814, on general subject; as to service of notice of publication, in *Beaure v. Brigham*, 79 Wis. 441.

Jurisdiction.—If it appear by the record or otherwise that the court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it comes directly or collaterally in question; and this is so whether the court be of inferior or superior jurisdiction. It is a fundamental rule that no court can acquire jurisdiction by the mere assertion of it, or by deciding that it has it, p. 314.

Affirmed in *McMinn v. O'Connor*, 27 Cal. 246. Cited in *Wallace v. Mayor*, 29 Cal. 188, holding with regard to a corporation that "no officer can acquire power or jurisdiction by the mere assertion of it"; also in *Forbes v. Hyde*, 31 Cal. 348, to the point that when it appears in the record that the court had no jurisdiction of the person of the defendant, the judgment may be collaterally attacked. Modified in *Hahn v. Kelly*, 34 Cal. 402, 94 Am. Dec. 746, saying that in the principal case "the rule may be stated too broadly," and that the language there used "implies that a want of jurisdiction may be shown aliunde, but no such question was involved in that case, and what was said upon that subject must be considered dictum"; and holding "the true rule to be that . . . where the record is silent as to what was done, it will be presumed that what ought to have been done was not only done but rightly done; but when the record states what was done, it will not be presumed that something different was done," p. 407. Cited in *Galpin v. Page*, 18 Wall. 369, where Field, J., says: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was at the time of the alleged service without the territorial limits of the court and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree." Cited in *Hall v. Melvin*, 62 Ark. 444, 54 Am. St. Rep. 302, saying: "Where a bill shows no cause of action against the defendant with reference to the subject matter of the suit, . . . a decree based upon such a bill is a nullity, no matter how attacked"; *Adams v. Adams*, 154 Mass. 297, where a divorce record from a California court is held invalid for lack of jurisdiction therein of the person of defendant. Affirmed in *Palmer v. McMaster*, 8 Mont. 192.

Attachment Lien on land cannot be effectual to impeach a conveyance of the land by the defendant in the attachment suit, until judgment is rendered therein, p. 315.

Cited in *McClellan v. Solomon*, 23 Fla. 444, 11 Am. St. Rep. 387, holding that a "judgment lien relates back to the date of the levy, as against the judgment debtor and his fraudulent grantee, or as against anyone purchasing the real estate as the property of the judgment debtor subsequent to the attachment"; and that the "title of the purchaser at a sale under the judgment dates as against such parties from the date of the levy of the attachment."

Creditor's Bill, to impeach for fraud a conveyance by the debtor, must be brought by a judgment creditor; as between the grantor and grantee, a conveyance executed to defraud creditors is valid, p. 316.

Cited in *Aigeltinger v. Einstein*, 143 Cal. 614, but denying right of attaching creditor to set aside conveyance before judgment and execution;

Hoffman v. Tucker, 58 Neb. 462, on point that administrator of estate cannot sue to vacate fraudulent conveyance by accident before creditor's claims have been allowed; *Ohm v. Superior Court*, 85 Cal. 548, 20 Am. St. Rep. 247, holding that where a decedent made a deed in fraud of creditors, "any creditor is entitled to maintain an action to set aside such a fraudulent conveyance, but he must be a creditor whose claim has been allowed by the administrator or is evidenced by a judgment"; to same effect in *Field v. Andrada*, 106 Cal. 110, and *Murphy v. Clayton*, 114 Cal. 536. Distinguished in *Quarl v. Abbott*, 102 Ind. 244, 52 Am. Rep. 670, holding that the rule that only judgment creditors can sue is not in force in Indiana, and even under the old rule there were exceptions. Cited in note to 90 Am. Dec. 288, 290, on creditor's bills.

Tax Deed of land to a grantee in possession thereof under claim of right, does not pass the title; when he paid the taxes properly levied, he only discharged his own obligation under the law, p. 318.

Affirmed, as to purchase by an administrator's agent, in *Bernal v. Lynch*, 36 Cal. 146. Affirmed in *Barrett v. Amerein*, 36 Cal. 326; *Garwood v. Hastings*, 38 Cal. 223; *Reily v. Lancaster*, 39 Cal. 356; *Burns v. Lewis*, 86 Ga. 604; *Stears v. Hollenbeck*, 38 Iowa, 551. Cited in *Wambole v. Foote*, 2 Dak. 27, holding that one owning land under recorded deeds is bound to pay the taxes. Distinguished in *Seaver v. Cobb*, 98 Ill. 204, saying: "Here the appellee was in possession, but claimed no title in himself, but that it was in the general government. . . . Conceding the correctness of the rule [in the principal case], it does not govern this." Cited in *Hadley v. Musselman*, 104 Ind. 461, holding that a bailee for hire may be purchaser, saying: "Where the person who buys is under a contract or duty to pay taxes, he cannot become a purchaser, but where there is no contract and no duty he may buy"; also in *Curtis v. Smith*, 42 Iowa, 671, saying that where possession is held neither as tenant, trustee, nor agent of the owner, it can be no impediment to acquisition of a tax title; and in notes on this point to 75 Am. St. Rep. 250, 15 Am. Dec. 685, 686, and 85 Am. Dec. 100.

Comment by the Judge, after a ruling on evidence, as to the respectability of the witness, held to be an irregularity that would warrant reversal of the judgment, if the judgment depended in any material degree upon the testimony of the witness, p. 320.

Cited in *Estate of Blake*, 136 Cal. 311, as to comments on credibility of expert evidence; *Barlow etc. Co. v. Parsons*, 73 Conn. 707, reversing judgment for action of judge; *Penn. Co. v. Hunsley*, 23 Ind. App. 50, holding instruction reflecting on credibility erroneous; *State v. Kerns*, 47 W. Va. 269, ruling similarly as to instruction as to defendant's guilt; *People v. Willard*, 92 Cal. 490, where an expression by the court, in ruling on evidence, to the effect that a witness "had contradicted herself several times," was held error; *People v. Van Ewan*, 111 Cal. 152, where an instruction as to the credibility of the defendant in a crimi-

nal case was held error; *Sharp v. State*, 51 Ark. 155, 14 Am. St. Rep. 33, holding that a question asked of a witness by the court was ground for a new trial; *Garner v. State*, 28 Fla. 146, 29 Am. St. Rep. 247, where remarks of the court in a ruling on evidence were held error; to same effect in *State v. Harkin*, 7 Nev. 383, *State v. Tickel*, 13 Nev. 512, *State v. Lucas*, 24 Oreg. 174, and *Neill v. Rogers Co.*, 38 W. Va. 232; *State v. Pomeroy*, 30 Oreg. 29, holding an expression of opinion as to motives of a witness, in a charge to a jury, to be error; and in notes on this point to 72 Am. Dec. 546, 547, and 14 Am. St. Rep. 47.

Statement on motion for new trial should contain only necessary evidence; and the lower court should exact a compliance with the law on the subject, p. 321.

Approved in dissenting opinion in *Quivey v. Gambert*, 32 Cal. 318.

General Citations.—*Kirk v. Territory*, 10 Okla. 62. *Wilson v. Territory*, 9 Okla. 335.

27 Cal. 322-329; 87 Am. Dec. 76. **MEGERLE v. ASHE.**

Selection and Location by the state, of lands granted under the act of Congress of 1841, vests in the state and her grantee "a title superior to that asserted by the holder of a subsequent patent issued by the general government," p. 328.

Cited in *Megerle v. Ashe*, 33 Cal. 81, holding that plaintiff, claiming under a United States patent, had failed to show his prior right under a pre-emption claim, as against a location of school land warrants by defendant and a state patent thereon; *Bludworth v. Lake*, 33 Cal. 262, to the point that "when the selection and location are once made, pursuant to the directions, of lands not reserved, but subject to location, the general gift of quantity becomes a particular gift of the specific lands located, vesting in [the state] a perfect and absolute title to the same, and that title passes by her patent"; *Smith v. Athern*, 34 Cal. 512, to the point that public lands are not liable to location on school land warrants until after they are surveyed by the United States; *Poppe v. Athearn*, 42 Cal. 608, holding that an unsigned indorsement on plat of survey in the register's office fixed the time of filing thereof. Distinguished in *Roberts v. Columbet*, 63 Cal. 24, holding that where defendant located a school land warrant on unsurveyed lands that had been donated to the state, the location was good as against a later patent issued by the state to another claimant after survey of the lands. Cited in *Knabe v. Burden*, 88 Ala. 439, holding that where plaintiff claimed under a United States certificate of entry, and defendant claimed under a state patent, the presumption was legitimate that proper selection of the land had been made before the state asserted title to it and issued the patent; note to *GrosLouis v. Northcut*, 3 Oreg. 399, to the effect that

title passes by virtue of the statute and not by the patent; and in notes to 85 Am. Dec. 94, and 99 Am. Dec. 186.

27 Cal. 329-337; 87 Am. Dec. 81. **DE UPREY v. DE UPREY.**

Partition.—Any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in such action, p. 335.

Affirmed in *Morenhout v. Higuera*, 32 Cal. 294; *Bollo v. Navarro*, 33 Cal. 465, 468; *Gates v. Salmon*, 35 Cal. 597; 95 Am. Dec. 150; *Sutter v. San Francisco*, 36 Cal. 116; *Hancock v. Lopez*, 53 Cal. 371; *Martin v. Walker*, 58 Cal. 593, 594, saying: "The proceeding in partition is here held to be one in which the rights of all parties may be fully inquired into and finally determined; it answers the double purpose of dividing the land and settling the title, and the mere fact of an adverse holding by the defendant constitutes no objection to the proceeding." Cited in *Bartlett v. Mackey*, 130 Cal. 182, 183, holding allegation as to prejudice to owners unnecessary in complaint; *Adams v. Hopkins*, 144 Cal. 29, applying rule to alleged adverse occupants; *Ivancovich v. Weilenman*, 144 Cal. 763, discussing effect of judgment as to liens not litigated; dissenting opinion in *Heinze v. Butte etc. Min. Co.* 126 Fed. 28, majority holding where intervener in partition files cross-bill setting up equitable title to interest claimed by complainant and prays for cancellation of deeds on ground of fraud and insanity of grantor, and that he be declared owner of such interest, court need not stay partition suit; *Emeric v. Alvarado*, 64 Cal. 618, saying that "before any partition is ordered or can be made, the interests and shares of the parties are to be determined and adjudged by the court. . . . In no case should a question of title be left to the referees." Cited in *Christy v. Spring Valley*, 68 Cal. 76, holding that a defendant in a suit for partition "was bound to disclose its adverse claims to the land, so that the court might ascertain and determine them"; *Jameson v. Hayward*, 106 Cal. 687, 46 Am. St. Rep. 270, saying: "It was the evils and inconveniences of cotenancy which gave rise to the writ of partition in the English courts, and it was to avoid these detriments to full and complete enjoyment of realty that statutes have been created to enforce partition. This court has gone to great length in upholding the right of a tenant in common to maintain the action where he had a right to the present possession, although not in actual possession." Distinguished in *Grant v. Murphy*, 116 Cal. 431, 432, 58 Am. St. Rep. 191, holding that where the interest of the estate of a decedent in partition had been ascertained, but a contest between claimants to the estate was pending in the probate court, it was proper to proceed to a division, leaving the contestants to settle their claims among themselves in the proper court. Cited in *Glasscock v. Hughes*, 55 Tex. 469, to the point that rights of all parties are to be determined in a partition suit; to same effect in *Kromer v. Friday*, 10 Wash. St. 640, and *Royston v. Miller*, 76 Fed. Rep. 58; and in

notes on partition in 87 Am. Dec. 707; 89 Am. Dec. 433; 95 Am. Dec. 152; 33 Am. St. Rep. 156; 37 Am. St. Rep. 100.

Answer cannot cause dismissal of suit on the pleadings, p. 334.

Distinguished in *Kelley v. Kriess*, 68 Cal. 212, holding that "if a complainant fails to state facts sufficient to constitute a cause of action, advantage may be taken of the defect by demurrer, by motion for judgment on the pleadings, or upon a motion for new trial."

27 Cal. 337-339. **JENKINS v. FRINK.**

Statement on Motion for New Trial.—If it is not filed in time, the motion is waived, p. 338.

Cited in *Quivey v. Gambert*, 32 Cal. 305, holding that an order striking out a statement is not appealable; also in dissenting opinion on page 313 of same case, *contra*. Affirmed in *Campbell v. Jones*, 41 Cal. 518. Cited in *Wallace v. Lewis*, 9 Mont. 403, holding the mere filing does not constitute a motion, but "the attention of the court must be called to it in some way by some movement of counsel."

27 Cal. 340-342. **PEOPLE v. HODGES.**

Accessory must be tried in the county where he committed the offense, p. 341.

Affirmed in *People v. Stakem*, 40 Cal. 602. Approved in dissenting opinion in *Gibbs v. Gibbs*, 26 Utah, 427, majority holding where defendant answers district court of county in which plaintiff in divorce suit on ground of adultery resides has jurisdiction, though adultery committed in another county.

27 Cal. 346-349. **REED v. ELDREDGE.**

Judgment is a contract for the payment of money, p. 348.

Affirmed in *Bean v. Loryea*, 81 Cal. 153. Cited in *Dore v. Thornburgh*, 90 Cal. 66, 25 Am. St. Rep. 101, holding that an English judgment is not a contract barred in two years under section 339 of the Code of Civil Procedure.

Judgment requiring that the amount thereof be paid in current coin is erroneous, p. 349.

Cited in *Howe v. Nickerson*, 14 Allen, 405, holding that a bill in equity does not lie to enforce specific performance of an award ordering an amount paid in gold coin; dissenting opinion in *Louisville Co. v. State*, 8 Ind. App. 381, a majority of the court holding that a court can furnish a remedy for an existing right; and in note to 87 Am. Dec. 126, on legal tender.

27 Cal. 350-357. **ELLIS v. POLHEMUS.**

Probate Claims.—Interest on shall not exceed ten per cent when estate is insolvent, p. 354.

Distinguished in *Visalia etc. Bank v. Curtis*, 135 Cal. 353, and held inapplicable to action to foreclose decedent's mortgage, allowing interest at conventional rate.

Claim, within the meaning of section 131 of the Probate Act, includes a note and mortgage securing it, p. 354.

Cited in *Pitte v. Shipley*, 46 Cal. 160, 161, holding that a mortgage is a claim that must be presented against a probate estate; *Verdier v. Roach*, 96 Cal. 472, 474, holding that under section 1493 of the Code of Civil Procedure a contingent claim must be presented to an administrator for allowance, although the contingency does not happen until more than two years after the expiration of time for presenting claims; *Reid v. Sullivan*, 20 Colo. 501, holding that a statute barring claims after one year does not apply to a claim secured by trust deed; *Toulouse v. Burkett*, 2 Idaho, 175, 176, holding that a vendor's lien is not a claim; *Bush v. Adams*, 22 Fla. 190, holding that a mortgage is within a statute of nonclaim; dissenting opinion in *Corbett v. Rice*, 2 Nev. 337, 338, a majority of the court holding that "equity courts have jurisdiction to foreclose mortgages against estates of deceased persons"; *Northwestern Bank v. State*, 18 Wash. St. 76, holding that the word "claim" in a statute regarding suits against the state, had the meaning of "cause of action"; and in note to 81 Am. Dec. 146, on claims.

27 Cal. 358-360. **VANCE v. OLINGER.**

Pending Suit in Ejectment, between the same parties for the same land, is not ground for dismissal of a second suit, unless the latter is for the same injury on the same issues, p. 359.

Cited in *McCormick v. Gross*, 135 Cal. 305, and *Beardsley v. Morrison*, 18 Utah, 483, 72 Am. St. Rep. 798, holding plea insufficient as stated; *Marshall v. Shafter*, 32 Cal. 195, holding that "there is but one title between the parties to the action to recover the possession of the premises, though there may be many evidences of title. It is impossible that two persons claiming adversely to each other can at the same time hold such right or title in the premises as will entitle each as against the other to the possession. . . . The court determines which of the two holds it." Affirmed in *Larco v. Clements*, 36 Cal. 134; *Martin v. Splivalo*, 69 Cal. 615. Cited in *Leonard v. Flynn*, 89 Cal. 541, 23 Am. St. Rep. 503, to the point that "a plaintiff may have two suits against the same defendant for the recovery of the possession of the same land pending at the same time, if the second is brought on a title acquired after the commencement of the first"; *Arnold v. Woodward*, 14 Colo. 167, saying: "The judgment in the former suit would not estop prosecution of the present suit, so that suit cannot abate this"; and in note on this point in 85 Am. Dec. 211.

27 Cal. 360-369. **AMERICAN CO. v. BRADFORD.**

Special Verdict may be rendered by the jury, in their discretion, in

a suit for the recovery of money only on specific real property. In other cases the court may direct a special verdict, and it is the court's province to determine as to what particular facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question to the jury, and for refusing to comply with such a request no error can properly be assigned, p. 365.

Affirmed, as to discretion of court, in *Smith v. Occidental Co.*, 99 Cal. 472; also, as to discretion of jury, in *Thompson v. Gregor*, 11 Colo. 534. Cited in *Prosser v. Montana Central Co.*, 17 Mont. 386, saying: "In the case at bar no findings were requested by the appellant. He did not ask that the court submit special findings upon any branch of the case. Not having made this request, he cannot complain of the action of the court. It certainly would have thrown the jury into inextricable confusion to instruct them, as appellant requested, that they might find special findings or a special verdict, when not the slightest intimation was given to them upon what questions of fact they should find." Cited in *Bank v. Marshall*, 8 Sawy. 39, 11 Fed. Rep. 28, to the point that "submission of particular questions of fact to the jury is a matter wholly within the discretion of the court"; and *Mangum v. Bullion Co.*, 15 Utah, 551, holding it was not error to refuse to submit to the jury defendants' request for special findings in a suit for damages for negligence.

Easement in Water is created by an exclusive and interrupted enjoyment of water, in any particular way, for a period corresponding to the time limited by statute within which an action must be commenced for the recovery of the property or of the assumed right held and enjoyed adversely. The right must have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted. The burden proving this is on the party claiming the easement, pp. 366, 367.

Cited in *Bree v. Wheeler*, 129 Cal. 147, *Strong v. Baldwin*, 137 Cal. 438, and *Smith v. Water Co.*, 16 Utah, 203, holding evidence insufficient to sustain finding of adverse user of water; *Franz v. Mendonca*, 131 Cal. 208, on point that permissive use is not adverse; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 597, holding prescriptive right properly pleaded; *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Or. 216, as against riparian owners one who diverts water may require title by prescription in same time necessary to acquire title by adverse possession; *Lux v. Haggin*, 69 Cal. 358, holding (on page 355) that "both the right to appropriate water on the public lands and that of the occupant of portions of such lands are derived from the implied consent of the owner, and as between the appropriator of land or water the first possessor has the better right. The two rights stand upon an equal footing, and when they conflict they must be decided by the fact of priority. Since the United States, the owner of the land and water,

is presumed to have permitted the appropriation of both the one and the other, as between themselves the prior possessor must prevail." Cited in *Stanford v. Felt*, 71 Cal. 250, to the point that "the diversion by lapse of time may grow into a right;" also in *Alta Co. v. Hancock*, 85 Cal. 226, 20 Am. St. Rep. 221, holding that the use must be "adverse" and "uninterrupted" on which to base a claim by prescription, and saying (on page 230): "So far the right of a riparian proprietor to the use of water for purposes of irrigation at all has been assumed rather than determined, and has been properly regarded as among the last, though perhaps not the least important, of his riparian rights; one that must be always held in subordination to the rights of all other riparian proprietors to the use of water for the supply of the natural wants of man and beast." Affirmed, as to burden of proof of adverse possession of land being on the party relying on it, in *DeFrieze v. Quint*, 94 Cal. 663, 28 Am. St. Rep. 157; and to same effect, as regards appropriation of water, in *Ball v. Kehl*, 95 Cal. 613; also in *Faulkner v. Rondoni*, 104 Cal. 146, holding that after adverse and uninterrupted user of water for five years "the law will presume a grant of the right." Cited in *New Mercer Co. v. Armstrong*, 21 Colo. 365, saying as regards abandonment: "Nonuse alone is not sufficient evidence; the intent to abandon must also be present. . . . Y. never made use of any portion of either of his ditches for more than nine years, and of no part of this water in excess of three and five tenths cubic feet per second of time during a period of from eighteen to twenty-one years, and this was an unreasonable time for an owner of a water right not to make any use thereof, to entitle him afterward to reclaim it as against intervening rights." Cited in *Carmody v. Mulrooney*, 87 Wis. 554, which was a case of right of way, to the point that while burden of proof is on one claiming the right by prescription, an uninterrupted user for twenty years is presumed to have been under claim of right; also in *Union Co. v. Dangberg*, 81 Fed. Rep. 91, holding that "a mere scrambling possession of the water, or the obtaining of it by force or fraud, gives no prescriptive right, nor can this right be acquired if, during the time in which such right is claimed to have accrued, there has been an abundant supply of water in the stream or river for all other claimants;" and in note on this point in 85 Am. Dec. 151.

Easement as a Defense must be specially pleaded, p. 367.

Cited in *Lux v. Haggin*, 69 Cal. 267, to the point that "a party claiming the right to use water by adverse possession for the statutory time must set up the same as a defense in his answer"; *McKeon v. Northern Pacific Co.*, 45 Fed. Rep. 465, holding that an easement must be set up as new matter in defense; and in note to 69 Am. Dec. 706, on this point.

N. B.—In *Courtwright v. Bear River Co.*, 30 Cal. 585, the principal case is cited as an example of a suit to abate a nuisance being brought

in a district instead of a county court; and it is also cited, evidently by mistake, in *Knight v. Fisher*, 15 Colo. 180, to the point that an error of a two cents in a verdict was immaterial.

27 Cal. 372-375. **ELGIN v. HILL.**

Deposition held sufficiently show the date when it was taken, but the date is of no consequence, p. 374.

Affirmed in *Birmingham Co. v. Alexander*, 93 Ala. 135.

Overdue Note.—Indorsee takes it subject to all existing defenses, p. 375.

Affirmed in *James v. Yaeger*, 86 Cal. 187.

27 Cal. 375-376. **McEVOY v. IGO.**

Forcible Entry and Detainer must be alleged in a complaint for it, p. 376.

Affirmed in *Morse v. Boyde*, 11 Mont. 249.

27 Cal. 376-394. **CROWTHER v. ROWLANDSON.**

Mental Incapacity of grantor is ground for canceling a deed, p. 382.

Cited in note to 1 Am. St. Rep. 88.

Motion for New Trial cannot be made until a case has been "tried"; and a reference having been ordered, the trial of case was not complete until the final report of the referee was filed, p. 385.

Affirmed in *Harris v. San Francisco Sugar Co.*, 41 Cal. 406, *Hinds v. Gage*, 56 Cal. 488, and *Duff v. Duff*, 71 Cal. 519. Cited in *Bixby v. Bent*, 59 Cal. 532, holding that an appeal from a decree in partition, pending proceedings for its modification, was premature. Criticised as a dictum in *Arnold v. Sinclair*, 11 Mont. 567, 28 Am. St. Rep. 493, holding that "the fact of a residence being had after judgment does not in itself determine that the judgment is not final." Cited in *Rhodes v. Williams*, 12 Nev. 26, holding an appeal premature, because the decree appealed from had ordered an accounting and sale.

Statement, on motion for new trial, must specify alleged errors of fact, p. 385.

Affirmed in *Graham v. Stewart*, 68 Cal. 376.

27 Cal. 394-404. **PEOPLE v. SHOTWELL.**

Where Court Directs Sheriff to Discharge Jury if they do not agree by certain hour, discharge by sheriff at hour named is not once in jeopardy, p. 398.

Approved in *State v. Costello*, 29 Wash. 370, plea of once in jeopardy cannot be based on discharge of jury where they had been out nineteen hours and reported that they could not agree.

Indictment can charge but one offense; but objection on this ground must be raised by demurrer, not by motion in arrest of judgment, p. 401.

Cited in *People v. Frank*, 28 Cal. 513, holding that an indictment for forgery may charge all the acts enumerated in the statute in the same count or in different counts; *People v. Garnett*, 29 Cal. 626, to the point that objection must be taken by demurrer; *People v. De La Guerra*, 31 Cal. 461, holding that only one offense was charged; *People v. Jim Ti*, 32 Cal. 62, to the point that objection to description of money stolen must be taken by demurrer. Affirmed in *People v. Burgess*, 35 Cal. 118. Cited in *People v. Mitchell*, 92 Cal. 591, holding that while it was proper to combine in the same information charges of forging and of uttering, yet the intent to defraud not being specifically alleged, a new trial must be granted, and a new information filed; *People v. Smith*, 103 Cal. 565 holding that where one count is bad and another good, but the lower court holds both good and there is a verdict of 'guilty on both, it is error; dissenting opinion in *People v. Thompson*, 111 Cal. 254, a majority of the court holding that where several acts were charged in one count, the offense was established by proof of any one of them; and in *People v. Gusti*, 113 Cal. 179, holding that a number of acts charged in one count were really but one offense. Cited in dissenting opinion in *Territory v. Duffield*, 1 Ariz. 70, a majority of the court holding an indictment bad for charging two offenses; *People v. Stapleton*, 2 Idaho, 52, to the point that objection to sufficiency of indictment must be raised by demurrer; *People v. O'Callahan*, 2 Idaho, 146, holding that conviction may be for a lower degree of the offense charged, but not for a higher; *People v. Morris*, 80 Mich. 636, holding that on a plea of guilty to two counts, charging different degrees, it was proper to punish for the highest, and to same effect, as to a verdict of guilty, in *State v. Core*, 70 Mo. 496; *Territory v. Poulier*, 8 Mont. 150, holding that two counts for forgery of a note charged different offenses, because it was not averred that the notes were the same; *Thompson v. People*, 4 Neb. 526, holding that it was too late on appeal to raise the objection that an indictment charged several offenses; *State v. Malim*, 14 Nev. 290, holding that two counts charged but one offense; and in note on this point in 58 Am. Dec. 247-250.

27 Cal. 404-408. **PEOPLE v. ANTONIO.**

Indians.—The act of 1850, regarding punishment of Indians, applies only where they are living in separate communities, and not to an Indian living among white men, p. 405.

Cited in *State v. Williams*, 13 Wash. St. 339, holding that an information against an Indian need not aver that he is not a member of a tribe and that the offense was not committed on the reservation; *State v. Duxtater*, 27 Wis. 294, holding that the criminal laws of the state apply to Indians on reservations within the state; *United States v.*

Sacoodacot, 1 Dill. 277, 1 Abb. U. S. 383, where a federal court turned over an Indian, charged with murder, to a state court, the offense having been committed off the reservation and within the state of Nebraska.

Larceny.—Possession of property recently stolen is a circumstance to be considered in determining guilt, and “with proof of other circumstances indicative of guilt would make a *prima facie* case,” p. 407.

Affirmed in *People v. Kelly*, 28 Cal. 427; *State v. Cassady*, 12 Kan. 560; *Foster v. State*, 52 Miss. 699. Distinguished in *Thompson v. People*, 4 Neb. 529, saying: “The better rule seems to be that if possession be recent, it makes out a *prima facie* case to be left to the jury.” Cited in note on this point in 70 Am. Dec. 447.

27 Cal. 408-413. **BURNETT v. PACHECO.**

Statement, on motion for new trial, must specify alleged errors, p. 410.

Affirmed in *Beans v. Emanuelli*, 36 Cal. 120, and *Graham v. Stewart*, 68 Cal. 376. Cited in note to 85 Am. Dec. 73.

27 Cal. 413-415. **ECKSTEIN v. CALDERWOOD.**

Motion for New Trial, if not prosecuted with due diligence, should be dismissed, p. 415.

Cited in *Storke v. Storke*, 132 Cal. 352, and *Galbraith v. Lowe*, 142 Cal. 296, dismissing motion for delay; dissenting opinion in *Quivey v. Gambert*, 32 Cal. 327, as an example of appeal from an order of dismissal.

27 Cal. 415-418. **PARTRIDGE v. SAN FRANCISCO.**

Statement on motion for new trial must specify alleged errors, p. 417.

Affirmed in *Graham v. Stewart*, 68 Cal. 376; *Thorpe v. Freed*, 1 Mont. 663; *Gill v. Hecht*, 13 Utah, 8.

27 Cal. 418-425. **ELIAS v. VERDUGO.**

Parol Partition.—“Agreements in relation to land, resting in parol, ought to be very satisfactorily proved,” p. 425.

Cited in *Lanternman v. Williams*, 55 Cal. 66, holding a parol partition invalid; and in note on this point in 92 Am. Dec. 122.

Homestead “cannot be carved out of land held in joint tenancy or by tenancy in common,” p. 425.

Affirmed in *Seaton v. Son*, 32 Cal. 483; *Cameto v. Dupuy*, 47 Cal. 80; *First Nat. Bank v. De La Guerra*, 61 Cal. 111; *Carroll v. Ellis*, 63 Cal. 442; also in *Fitzgerald v. Fernandez*, 71 Cal. 507, holding that under the act of 1868, allowing a homestead on land held in cotenancy, if in exclusive occupation of claimant, the facts did not show a valid homestead; and in

Rosenthal v. Merced Bank, 110 Cal. 202; also in dissenting opinion in *McGuire v. Van Pelt*, 55 Ala. 357, a majority of the court disapproving the principal case. Cited in *Newton v. Summey*, 59 Ga. 400, holding that a partnership had no right to an injunction against the allowance of a homestead to the wife of one of the partners, for if her claim was subordinate to partnership claims the allowance of a homestead would not protect it; also in *Lindley v. Davis*, 6 Mont. 456, holding that a homestead cannot be carved out of partnership property by a partner; but in a rehearing of the same case in 7 Mont. 214, the former decision was reversed, and the court held that a cotenant was entitled to a homestead exemption, there being no reason why homestead laws should be strictly construed. Cited in *re Parks*, 9 Bank. Reg. 273, holding it unnecessary to decide the question; and in *In re Blodgett*, 10 Bank. Reg. 147, holding there is no separate exemption to individual members of a firm out of partnership property.

Affirmed in *West v. Ward*, 26 Wis. 581. Cited in note on homestead in 63 Am. Dec. 122, 123.

Foreclosure Decree should save the rights of any defendants who claim adversely to the title mortgaged, p. 425.

Affirmed in *Odell v. Wilson*, 63 Cal. 160. Cited in note to 79 Am. Dec. 192.

27 Cal. 425-432; 87 Am. Dec. 87. **AGNEW v. STEAMER.**

Carrier of Animals.—Where the cause of damage is unconnected with the conduct or propensities of the animal, "the carrier is subjected to the ordinary responsibilities connected with his vocation," p. 429.

Cited in notes to 92 Am. Dec. 56; 97 Am. Dec. 408; 411; 2 Am. St. Rep. 500; 37 Am. St. Rep. 639; *Heller v. Chicago etc. Co.*, 63 Am. St. Rep. 550.

27 Cal. 433-438; 87 Am. Dec. 90. **BUCKOUT v. SWIFT.**

Issues of Facts raised by the answer are presumed to have been found for defendant, when the judgment is for him without findings, p. 435.

Affirmed in *Lount v. Lount*, 1 Ariz. 425. Cited in note to 92 Am. Dec. 548.

Mortgage.—Severance of a house from mortgaged premises by a flood changes it from real to personal property; it is withdrawn from the operation of the mortgage lien, and the mortgagor has the right to sell it, p. 437.

Cited in *Hill v. Gwin*, 51 Cal. 50, holding that severance of machinery from a mortgaged mill, by consent of the mortgagee, frees it from the lien; to same effect in *Lavenson v. Standard Co.*, 80 Cal. 247, 13 Am. St. Rep. 149; also in *Moisant v. McPhee*, 92 Cal. 79, as to taking bark from trees on mortgaged land. Cited in *Robbins v. Sackett*, 23 Kan. 304, holding that a mortgagee cannot claim to own a house on the mortgaged

land; *Tomlinson v. Thompson*, 27 Kan. 73, holding that where a mortgagor moved a house from the land and sold it after beginning of foreclosure proceedings, an action did not lie by the mortgagor against the buyer; *Harris v. Bannon*, 78 Ky. 571, holding that a mortgage lien cannot be enforced against buildings removed to other than the mortgaged land; *Verner v. Betz*, 46 N. J. Eq. 267, 19 Am. St. Rep. 391, holding that where a mortgagor removed a building to another lot and sold it and the lot, the building could not be ordered back in foreclosure proceedings, but the remedy was at law for its removal; *Willis v. Moore*, 59 Tex. 639, 46 Am. Rep. 291, holding that the buyer of land at a foreclosure sale is not entitled to the crops thereon as against a buyer of them from the mortgagor, the crops being no part of the realty; to same effect in *White v. Pulley*, 27 Fed. Rep. 441; *The Canada*, 7 Sawy. 182, 7 Fed. Rep. 250, holding that where a mortgaged ship was recaptured, the old copper belonged to the mortgagor; and in notes to 92 Am. Dec. 245, 95 Am. Dec. 798, and 28 Am. St. Rep. 325. Disapproved in *Patton v. Moore*, 16 W. Va. 440, 37 Am. Rep. 792, holding that an engine and machinery, fixtures in a mill, did not lose this character by being washed out by a flood, and they were not subject to levy as chattels.

Injunction Against Waste of mortgaged premises will not be granted unless the waste renders the security inadequate, p. 437.

Affirmed in *Perrine v. Marsden*, 34 Cal. 18; *Miller v. Waddingham*, 91 Cal. 381; also in *Stowell v. Waddingham*, 100 Cal. 9, holding that injunction could not be granted after removal of buildings from mortgaged land, even though the removal rendered the security inadequate. Cited in *Williams v. Chicago etc. Co.*, 188 Ill. 32, but holding complaint sufficient to warrant injunction against removal of fixtures; *Beaver Lumber Co. v. Eccles*, 43 Or. 402, upholding injunction suit by mortgagee of timber lands and timber to restrain operation of sawmill by mortgagor; *Moriarty v. Ashworth*, 43 Minn. 2, 19 Am. St. Rep. 204, refusing to enjoin quarrying of granite on mortgaged premises, because it did not render the security inadequate. Disapproved in *Dakota Co. v. Parmalee*, 5 S. Dak. 346, 347, holding that neither severance of a building by the mortgagor nor its being annexed to other land destroyed the right of the mortgagee to enforce his claim against it after exhausting the land. Cited in *Morgan v. Gilbert*, 2 Fed. Rep. 838, holding that where the mortgagor is insolvent the mortgagee may bring trespass for his cutting timber on the land, impairing the security; and in note in 43 Am. St. Rep. 433, on this point.

27 Cal. 439-451. **NORRIS v. HENSLEY.**

Rule in Shelley's Case.—Devise to one for life, then to his heirs and assigns, vests a fee simple in the devisee, p. 442.

Cited in *Barnett v. Barnett*, 104 Cal. 299, holding that the rule in Shelley's case is abrogated by section 779 of the Civil Code. Affirmed in

Mulvane v. Rude, 146 Ind. 482; *Rona v. Meier*, 47 Iowa, 610; 29 Am. Rep. 495; *Pierce v. Pierce*, 14 R. I. 516. Cited in *Jones v. Port Huron Co.*, 171 Ill. 507, to the point that a restriction of an estate in fee by will, though for a limited time, is void, as depriving the first taker of his inherent power of alienation; and note to 57 Am. Dec. 489, 490.

27 Cal. 451-465. **McLAUGHLIN v. PIATTI.**

Sale of chattels, mingled with others, by number, weight or measure, is incomplete until the property is separated and identified, p. 463.

Cited in *Blackwood v. Cutting Co.*, 76 Cal. 217, 218, 9 Am. St. Rep. 203, 204, holding that on an agreement for sale of successive yearly crops of apricots, to be not less than seventy-five and not more than two hundred tons per annum, the title did not pass till the fruit was weighed; *Carpenter v. Glass*, 67 Ark. 139, denying right of plaintiff to maintain replevin under facts stated; *Commercial Bank v. Gillette*, 90 Ind. 269, 46 Am. Rep. 223, holding a sale of five hundred and ten wheels out of a lot of eleven hundred void, because they were not segregated; to same effect, as to sale of wood in a factory, in *New England Co. v. Standard Co.*, 165 Mass. 330; 52 Am. St. Rep. 518; and in note to 70 Am. Dec. 797.

Specific Enforcement of contract for sale of chattels is decreed in equity only where there can be no adequate compensation in damages at law, p. 463.

Affirmed in *Senter v. Davis*, 38 Cal. 454. Cited in note to 26 Am. Dec. 665.

Claim and Delivery.—This action under the code "is at least commensurate with the action of detinue at common law," p. 465.

Cited in *Everett v. Buchanan*, 2 Dak. 252, holding that it is not absolutely necessary to aver in a complaint the particular facts of an unlawful detention, but it is better pleading to do it; *Adams v. Wood*, 51 Mich. 415, holding that a buyer is entitled to a reasonable time to pay for goods, if no time is fixed, and the seller cannot replevy them before the time has elapsed; and in note to 9 Am. Dec. 107.

27 Cal. 465-469. **SOLANO CO. v. NEVILLE.**

County may sue to recover money from a tax collector that the law requires him to pay into the general fund, p. 469.

Cited in *Commissioners v. Lineberger*, 3 Mont. 239, holding that county commissioners are proper plaintiffs in a suit on the county treasurer's bond.

Tax Collector's compensation is fixed by the legislature, and any excess over this amount he must pay into the treasury, p. 469.

Affirmed, as to auditor's pay, in *Patton v. Placer Co.*, 30 Cal. 176, and as to tax collector in *Ream v. Sikiyou Co.*, 36 Cal. 622.

27 Cal. 470-475. **PEOPLE v. BANVARD.**

Motion for Nonsuit should particularize the supposed defects in the plaintiff's case, p. 474.

Affirmed in *Coffey v. Greenfield*, 62 Cal. 609; *Loring v. Stuart*, 79 Cal. 201; also in *Daley v. Russ*, 86 Cal. 117, saying that, "ordinarily, a ground which is not stated cannot be considered. . . . But the reason of the rule is to afford an opportunity to correct such defects as admit of correction. . . . Where the defects cannot be corrected, the error of not specifying the grounds of the motion is immaterial"; and in *Quimby v. Boyd*, 8 Colo. 197; *Wright v. Fire Ins. Co.*, 12 Mont. 477; and *Mattoon v. Fremont Co.*, 6 S. Dak. 198. Cited in note to 52 Am. Dec. 312, on nonsuit.

Term of Office of an incumbent of a public office may be shortened by the legislature, p. 475.

Cited in *Spring Valley v. San Francisco*, 61 Cal. 7, to the point that, unless otherwise provided by law, "the legislature may change such term or compensation even while the officer is in office"; and in *Ford v. State Harbor Commrs.*, 81 Cal. 26, holding that the commissioners had power to abolish the office of wharfinger. Affirmed in *State v. Kalb*, 50 Wis. 183, and *Douglas Co. v. Timme*, 32 Neb. 275.

Appeal from Judgment.—The testimony can only be reviewed on motion for new trial, p. 475.

Affirmed in *Federico v. Hancock*, 1 Ariz. 512. Cited, without apparent relevancy, in *Keeran v. Griffith*, 34 Cal. 585, to the point that a patent was admissible in evidence, no objection being made to the absence of preliminary proof.

General Citation.—*Lewis v. Silver King Min. Co.* 22 Utah, 53, 54.

27 Cal. 475-483. **HILL v. SMITH.**

Water for Mining.—Owner of a water ditch is entitled to protection from injury thereto by mining debris. Rules of the common law as to water rights have not been materially modified in this state; the reasons remain undisturbed, the conditions to which we are called upon to apply them are changed, p. 482.

Cited in *Courtwright v. Bear River Co.*, 30 Cal. 585, as an example of a district court taking jurisdiction of a suit to abate a nuisance; *Junkans v. Bergin*, 67 Cal. 269, holding that a later appropriator of water had no right by his mining operations to fill up the ditch of a prior appropriator; *Lux v. Haggin*, 69 Cal. 359, holding that on the public lands "as between the appropriator of land or water the first possessor has the better right. The two rights stand upon an equal footing, and when they conflict they must be decided by the fact of priority"; *Atchison v. Peterson*, 20 Wall. 515, where Field, J., says: "What diminution of quantity or deterioration in quality will constitute an invasion of the rights of the first ap-

proprietor will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied"; and in same case, 1 Mont. 567, holding a prior appropriator of water not entitled to an injunction against miners fifteen miles up the stream, who did no material harm to the stream, as "an injunction would cause infinitely more damage than it would remedy"; *Fitzpatrick v. Montgomery*, 20 Mont. 188, 63 Am. St. Rep. 625, awarding damages for injury to realty by deposit of tailings in stream; *Alder Gulch Co. v. Hayes*, 6 Mont. 38, holding that when water from a ditch has been used on a claim, it must be turned back for use by lower proprietors; in the great "Debris Case" of *Woodruff v. North Bloomfield Co.*, 9 Sawy. 535, 18 Fed. Rep. 802, granting a perpetual injunction against the discharge of mining debris into a stream; *Hewitt v. Story*, 64 Fed. Rep. 515, 519, holding that water rights had been lost by abandonment; *Union Mill Co. v. Dangberg*, 81 Fed. Rep. 95, where the court regulated the relative rights of quartz mills and farmers as to water from a stream; *Benton v. Johncox*, 17 Wash. St. 284, 61 Am. St. Rep. 918, holding that the doctrine of prior appropriation does not interfere with the common-law rule as to riparian owners; *Trambley v. Luterman*, 6 N. Mex. 26, 27, holding an easement established by adverse user of water, and later locator of land takes subject to the easement; and in note on this point in 43 Am. Dec. 279, 281, 282.

27 Cal. 483-489. **PAGE v. HOBBS.**

Pre-emption.—In order to connect themselves with the United States under the pre-emption laws it was necessary for the defendants [in ejectment] to show that they were persons entitled under this act to the benefit of its provisions, p. 486.

Affirmed in *Carder v. Baxter*, 28 Cal. 101; *Megerle v. Ashe*, 33 Cal. 90; *Quinn v. Kenyon*, 38 Cal. 501; *Burrell v. Haw*, 40 Cal. 377; *Schieffery v. Tapia*, 68 Cal. 186, 188. Distinguished in *Conkling v. Pacific Improvement Co.*, 87 Cal. 298, holding that in a bill for injunction against the diverting of water, it was sufficient for plaintiff to allege possession of the land and payment therefor, and it was unnecessary to aver that the lands were subject to pre-emption, because plaintiff made no claim of title in himself and did not question that of defendant. Cited in *Shiveley v. Pennoyer*, 27 Oreg. 37, holding that a pre-emption claimant must show his qualifications before he can purchase from the state; and in note to 87 Am. Dec. 133.

Suscol Rancho lands were withdrawn from pre-emption by the act of congress of 1841, except as to prior purchasers from Vallejo who had taken possession, p. 487.

Affirmed in *Page v. Fowler*, 28 Cal. 609, saying: "And there can be no doubt that congress had the power to thus withdraw the lands from pre-emption and the sale under the general laws, at any time prior to Notes Cal. Rep.—87

the acquisition by a settler of a right in the lands that he could maintain against the United States, so as to secure ultimately the legal title"; also in *People v. Shearer*, 30 Cal. 650; and in *Hutton v. Frisbie*, 37 Cal. 490, 491, saying: "The right of pre-emption is a mere privilege, . . . not a right of property as against the government, and it can be withdrawn at any time before it has been perfected into an obligation which can be enforced against the government itself, and that is before a sale and payment"; and in dissenting opinion in same case, pages 502, 503; also in *Durfee v. Plaisted*, 38 Cal. 83, saying: "The patent is the record of the government that the land was subject to entry by the patentees under the act of Congress, and was entered by them in conformity to law; and is conclusive evidence of the regularity, as well as the validity, of the action of the officers in passing upon and finally confirming their claim as purchasers from Vallejo or his assigns."

Declarations of Intention to pre-empt lands that are not subject to pre-emption are inadmissible in evidence, p. 487.

Distinguished in *Tyler v. Green*, 28 Cal. 408, 87 Am. Dec. 131, where plaintiff claimed under a pre-emption right to lands that were subject to pre-emption, and it was held he could prove by witnesses the facts necessary to establish his pre-emption right.

Recovery of Crops in Ejectment.—Point referred to but not decided, p. 489.

Cited in *Rathbone v. Boyd*, 30 Kan. 490, holding that a later settler in good faith is entitled to his crops, as against an earlier claimant who finally obtained the land.

27 Cal. 489-491. **PEOPLE v. AH PING.**

Accessory.—One may have been in the house with a thief, seeing him steal, and have made no attempt to interfere, and still be entirely innocent, p. 491.

Cited in *Walrath v. State*, 8 Neb. 88, to the point that mere personal presence when an offense is committed is not enough to make one a principal; and in note to 13 Am. Rep. 177, on aiding and abetting.

27 Cal. 491-495. **HEGELER v. HENCKELL.**

Waiver of Motion for new trial results from failure to file the statement within the statutory time, p. 494.

Affirmed in *Campbell v. Jones*, 41 Cal. 518, and *Elder v. Frevert*, 18 Nev. 282.

Amendment Nunc pro Tunc of clerk's minutes, by inserting an oral order alleged to have been made, cannot be allowed after expiration of the term, p. 495.

Cited in *Estate of Schroeder*, 46 Cal. 316, holding that clerical errors in a judgment may be amended "by the record" after the close of the

term; to same effect in *Bostwick v. McEvoy*, 62 Cal. 502, and *People v. Greene*, 74 Cal. 404; 5 Am. St. Rep. 452; *Kaufman v. Shain*, 111 Cal. 20, 52 Am. St. Rep. 141, holding that a court may correct an entry in its minutes, to make it correspond with the fact, upon whatever evidence the court deems satisfactory, at any time after the entry, and the error need not appear of record; and *Scamman v. Bonslett*, 118 Cal. 97, holding that where the error in a judgment is not of record, motion to amend must be made within the time prescribed by section 473, Code Civil Procedure. Cited in *Tynan v. Weinhard*, 153 Ill. 606, 607, holding that a judgment can be entered nunc pro tunc on record evidence only, and not by parol; *Clark v. Strouse*, 11 Nev. 79, holding that a record cannot be amended unless there is something to amend by; *Benedict v. State*, 44 Ohio St. 685, where a journal entry in a criminal case was allowed to be amended at a subsequent term; and in notes on this point in 12 Am. Dec. 353, 14 Am. Dec. 518, and 4 Am. St. Rep. 832, 834.

27 Cal. 495-497. **WALLACE v. ELDREDGE.**

Judgment by Default, entered by the clerk, held erroneous as to a provision for payment in current coin, and that part thereof ordered stricken out, p. 497.

Cited in *Harding v. Cowing*, 28 Cal. 214, holding that a judgment by default was the judgment of the court, not of the clerk who entered it; also in *Glidden v. Packard*, 28 Cal. 652, holding that a notice of motion to dissolve attachment "was not such an appearance in the case as would authorize the clerk to enter judgment by default"; *Bond v. Pacheco*, 30 Cal. 535, holding that where the clerk entered judgment by default for too large an amount, owing to an error in calculation of interest, it was "an error committed in the performance of an act within his jurisdiction to perform, which could be corrected on motion made in time, or on appeal, but which would not vitiate the judgment if not corrected"; *Providence Co. v. Prader*, 32 Cal. 636, 91 Am. Dec. 600, holding that in each case it must appear that what the clerk did was within the authority conferred on him by the statute; *Sacramento v. Central Pacific Co.*, 61 Cal. 255, holding that on an offer by defendant to allow judgment to be entered for a certain sum, for state and county taxes, the clerk had no right to enter judgment in a gross sum, not specifying the separate taxes of state and county, but less than the total amount claimed in the complaint. Cited in *Files v. Robinson*, 30 Ark. 494, holding that a judgment by default entered by the clerk in vacation did not comply with the statute; *Hazard v. Cole*, 1 Idaho, 287, holding that a judgment for gold coin was not void but irregular; *Graydon v. Thomas*, 3 Oreg. 252, holding that the clerk's duties in entering judgment by default are ministerial, not judicial.

27 Cal. 498-500. **WALLACE v. ELDREDGE.**

Judgment is a contract, p. 499.

Approved in *Weaver v. San Francisco*, 146 Cal. 732, judgment entered against city payable only out of funds of particular year pursuant to direction of supreme court on appeal, is *res adjudicata*, and cannot be modified.

Suits on Judgments are actions upon contracts, p. 499.

Affirmed in *Bean v. Loryea*, 81 Cal. 153; *Dore v. Thornburgh*, 90 Cal. 66; 25 Am. St. Rep. 101.

Consolidation of Suits, brought upon distinct causes of action, refused, p. 500.

Cited in note to 58 Am. Dec. 511.

Judgment for Coin held proper, p. 499.

Cited in note to 87 Am. Dec. 126.

Reversal of Judgment will not be ordered "by reason of any matter of fact that was not shown or offered in the court below," p. 500.

Affirmed in *Howard v. Quinn*, 2 Mont. 340.

27 Cal. 500-502. **PEOPLE v. BROWN.**

Verdict ought not to be disturbed if the evidence is conflicting, p. 501.

Affirmed in *Territory v. Stone*, 2 Dak. 171, and *State v. Van Winkle*, 6 Nev. 352.

27 Cal. 502-506. **OWEN v. DOTY.**

Forcible Entry and Unlawful Detainer must be proved by plaintiff, in the statutory action, p. 505.

Affirmed in *Winterfield v. Stauss*, 24 Wis. 408; *Torey v. Berke*, 11 S. Dak. 160, holding judgment for plaintiff unwarranted by facts stated.

27 Cal. 507-515; 87 Am. Dec. 95. **PEOPLE v. KING.**

Indictment for murder need not state the means of death or nature and locality of wound and ought not to state the degree of the crime. Our criminal code was designed to work the same change in pleading and practice in criminal actions which is wrought by the Civil Code in civil actions pp. 510-512.

Cited in *People v. Ah Woo*, 28 Cal. 208, holding that an indictment for forgery need not contain a copy in Chinese of the instrument forged; *People v. Shaber*, 32 Cal. 38, holding an indictment for burglary sufficient; *People v. Cronin*, 34 Cal. 200, 208, 210, holding that an indictment need not aver the mode or means of death; *People v. Nichol*, 34 Cal. 217, to the point that the degree of crime should not be averred; *People v. Dick*, 37 Cal. 280, to the point that the common law tests for indictments are superseded; to same effect in *People v. Kelly*, 59 Cal. 377; *People v. Hong Ah Duck*, 61 Cal. 389, and *People v. Hyndman*, 99 Cal. 3, holding that an information need not specify the means of death; *People v. Schmidt*, 63 Cal. 28, holding that malice aforethought should be averred;

People v. Rozelle, 78 Cal. 89, holding that an information stating facts sufficient to constitute defendant an accessory at common law, charges him as a principal under the code; *People v. Russell*, 81 Cal. 618, to the point that the degree of crime need not be specified; and in *Ex parte Mansfield*, 106 Cal. 408, holding that criminal complaints for misdemeanors, in justices or police courts, need not conclude with the phrase, "contrary to the form of the statute," etc.; *State v. St. Clair*, 6 Idaho, 112, where information for murder described deceased as John Doe, whose true name was unknown, and on trial it was proved that name was John L. Decker, there was no material variance. Cited in the following cases, holding that indictments sufficiently charged murder: *People v. Walters*, 1 Idaho, 274; *People v. Bemis*, 51 Mich. 424; *State v. Millain*, 3 Nev. 465; *State v. Thompson*, 12 Nev. 148; *State v. Moore*, 104 N. C. 751; *Wilkinson v. State*, 2 Tex. App. 266; *Brannigan v. People*, 3 Utah, 494; *State v. Day*, 4 Wash. St. 108; *United States v. Clark*, 46 Fed. Rep. 638; to same effect, as to robbery, in *State v. Lawler*, 130 Mo. 376, 52 Am. St. Rep. 581; as to unlawful cohabitation in *United States v. Cannon*, 4 Utah, 127, 134; and *Webb v. York*, 79 Fed. Rep. 621, refusing to release on habeas corpus a prisoner arrested in Colorado on a request for extradition from California, because the affidavit to the charge described an offense punishable under California law, though not under the statutes of Colorado; and in notes on indictments in 3 Am. St. Rep. 281 and 43 Am. St. Rep. 192.

Bias of Juror, to disqualify him, must be a fixed and settled conviction of the guilt or innocence of the defendant, p. 512.

Affirmed in *State v. Williams*, 49 La. Ann. 1151. Cited in *State v. Walton*, 74 Mo. 282, holding that a juror is not incompetent if his opinion "will readily yield to the evidence," and if he will "determine the issue upon the evidence"; *State v. Williams*, 49 La. Ann. 1151, holding juror not disqualified under facts stated; *Territory v. Bryson*, 9 Mont. 38, holding a juror competent whose opinion was formed from reading the newspapers; and in notes on this point in 36 Am. Dec. 523, 529.

Instruction to Jury, that there is no evidence reducing a charge of murder to manslaughter, does not violate the constitutional provision that the jury are sole judges of the weight of evidence, p. 514.

Cited in *People v. Byrnes*, 30 Cal. 207, to the point that "instructions are always to be given with reference to the facts proved before the jury"; also in *Levitky v. Canning*, 33 Cal. 305, holding in a civil case that "it was error to charge the jury that the plaintiff was entitled to recover"; *People v. Taylor*, 36 Cal. 266, holding that where the prosecution claimed the offense was murder, and the defense that it was manslaughter, the court properly charged as to both; and in *People v. Best*, 39 Cal. 691, holding that "no instruction should ever be given unless there is some evidence before the jury to which it is applicable upon

some rational theory of the case, logically deducible from such evidence." Affirmed in *Smith v. People*, 1 Colo. 144, and *State v. Garrand*, 5 Oreg. 220. Cited in *Territory v. Gay*, 2 Dak. 143, holding that the court properly charged that the verdict must be murder or manslaughter. Distinguished in *Wood v. State*, 31 Fla. 234, holding, under a different law, that a charge that the jury could not convict of certain degrees of murder and manslaughter was error. Cited in *United States v. Camp*, 2 Idaho, 218, holding that the charge should be a few plain propositions of law applicable to the facts; *State v. McGinnis*, 5 Nev. 339, holding a charge as to facts, in a case of assault with a weapon, to be error; *Territory v. Romera*, 2 N. Mex. 477, holding an instruction correct, that there was no evidence of any offense less than murder in the first degree; *Territory v. Baker*, 4 N. Mex. 131, holding an instruction as to heat of passion correct; *People v. Lee*, 2 Utah, 454, holding that the court in its charge may review the facts; *United States v. Cannon*, 4 Utah, 139, to the point that immaterial instructions need not to be given; and in notes on this point in 92 Am. Dec. 53; 7 Am. St. Rep. 600; 31 Am. St. Rep. 894; 37 Am. St. Rep. 94; 44 Am. St. Rep. 74.

In the absence of any statement or bill of exceptions embodying the evidence, or declaring its purport or tendency, so far as may be necessary to point the exception, we must presume in favor of the action of the court below, upon the principle that the party who alleges error must show it. But where such action of the lower court is manifestly erroneous under any and every conceivable state of facts, this court will review it, notwithstanding the evidence may not have been brought up, p. 514.

Cited in *People v. Torres*, 38 Cal. 143, holding that instructions were not "erroneous under every conceivable state of facts." Affirmed in *People v. Dick*, 32 Cal. 215; 34 Cal. 665; *People v. Brotherton*, 47 Cal. 404; *People v. Smith*, 57 Cal. 131; *People v. Gilbert*, 60 Cal. 111, 112; *State v. Mason*, 24 Mont. 342, noted under *People v. Levison*, 16 Cal. 98; notes on this point in 76 Am. Dec. 507; 95 Am. Dec. 696; 99 Am. Dec. 133, 134.

Drunkenness of defendant may be considered by the jury on the question of premeditation, to determine the degree of the offense, p. 514.

Cited in *People v. Hill*, 123 Cal. 49, noted under *People v. Belencia*, 21 Cal. 544; *People v. Harris*, 29 Cal. 683, to the point that drunkenness will not excuse crime. Affirmed in *People v. Williams*, 43 Cal. 352; *People v. Blake*, 65 Cal. 278; *People v. Vincent*, 95 Cal. 428. Cited in note on this point in 95 Am. Dec. 775.

Instructions, already given in substance, may be refused, but "it is better to give the instructions asked than to refuse, for by such refusal a pretext is afforded for an appeal which otherwise, perhaps, would not be taken," p. 515.

Affirmed in *People v. Strong*, 30 Cal. 155; *People v. Lachanais*, 32 Cal. 436. Cited in note to 99 Am. Dec. 127.

27 Cal. 515-522. GROGAN v. KNIGHT.

Public Lands.—A certificate of purchase of school lands from the state land office, before the lands have been surveyed by the United States, is not evidence of title; the survey must precede the selection, p. 519.

Affirmed in *Middleton v. Low*, 30 Cal. 604; *Smith v. Athern*, 34 Cal. 512. Cited in *Toland v. Mandell*, 38 Cal. 31, 33, 43, holding that since the act of Congress of July, 1866, locators on unsurveyed lands have the rights of pre-emptioners, on compliance by them with the statute, until their claims are determined by the proper authority. Affirmed in *Hastings v. Devlin*, 40 Cal. 363, 370; *Hastings v. Jackson*, 46 Cal. 243; *Chant v. Reynolds*, 49 Cal. 217. Distinguished in *Roberts v. Columbet*, 63 Cal. 24, holding that the locator of a school land warrant, prior to the passage of the act of 1866, may plead his right of possession under a general denial in ejectment. Affirmed in *Bullock v. Rouse*, 81 Cal. 594; *Layton v. Farrell*, 11 Nev. 455; and *United States v. Curtner*, 14 Sawy. 546; 38 Fed. Rep. 9. Cited in note on this point in 85 Am. Dec. 93.

27 Cal. 524-565. CARPENTIER v. WEBSTER.

Tenants in Common respectively have the right to enter upon and occupy the whole and every part of the common land, p. 545.

Affirmed in *Tevis v. Hicks*, 38 Cal. 239. Cited in *Mullins v. Butte etc. Co.*, 25 Mont. 536, noted under *Gunter v. Laffan*, 7 Cal. 589; *Paul v. Cragnaz*, 25 Nev. 315, discussing rights of ousted cotenant; *Spanish Fork City v. Hopper*, 7 Utah, 238, noted under *Waring v. Crow*, 11 Cal. 367; *Rodgers v. Pitt*, 129 Fed. 937, a number of owners in common of flume and irrigating ditch who divide waters flowing in ditch among them are tenants in common of water rights, and one alone may sue to enjoin diversion by subsequent appropriator of any portion of water; *Lytle Creek Co. v. Perdew*, 65 Cal. 452, saying that tenants in common of water "hold by unity of possession, though their titles be distinct. If this unity is destroyed, the tenancy no longer exists." Cited in *Mora v. Murphy*, 83 Cal. 16, holding that one tenant in common was entitled to his share of the land. Affirmed in *May v. Sturdivant*, 75 Iowa, 119; 9 Am. St. Rep. 465; and in *Miller v. Blackett*, 47 Fed. Rep. 549.

Ouster may consist in actual exclusion of one tenant in common by his cotenant, from part of the common land, or refusal of the latter to let the former into possession, though admitting his title, pp. 548-565.

Cited in *Carpentier v. Mendenhall*, 28 Cal. 485, 487, 87 Am. Dec. 135, 137, holding that an intent to oust "must be established as a fact by the finding of the jury." Affirmed in *Carpentier v. Gardiner*, 29 Cal. 162, 163; also in *Carpentier v. Mitchell*, 29 Cal. 333, holding that one ousted by his cotenant may recover damages. Cited in *Packard v. Johnson*, 57 Cal. 183, holding a finding as to ouster insufficient, and also

that plaintiff was ousted from the time when he became aware that his cotenant claimed the whole land, "or (at the very least) from the time when, as a prudent man reasonably attentive to his own interests, he ought to have known that his cotenant assented an exclusive right to the land of which both had had the common possession"; *Bell v. Hudson*, 73 Cal. 290, 2 Am. St. Rep. 795, holding that ouster was not properly averred in a complaint; *Stevenson v. Anderson*, 87 Ala. 232, holding that there may be ouster and adverse possession of part of the common premises, without affecting the status of the cotenants as to the remainder.

27 Cal. 572-587. **PEOPLE v. POOL.**

Where several join in robbery and resisting arrest, whatever is said or done by one of them, in furtherance of the common design, is the act of all, p. 576.

Affirmed in *Stephens v. State*, 42 Ohio St. 153. Approved in *State v. King*, 24 Utah, 492, where two defendants and another were associated to rob a person and such person was killed, killing, by whichever of three it was done, was act of all; *People v. Woods*, 147 Cal. 271, 272, admitting evidence of conspiracy for burglary and irrelevant incidents connected with burglarious trip in prosecution for murder.

Officer Making Arrest of a party committing an offense, or upon fresh pursuit afterward, need not disclose his official character or the cause of the arrest, p. 576.

Cited in *State v. Green*, 66 Mo. 649, and *In re Acker*, 66 Fed. Rep. 296, holding that an officer gave sufficient notice before attempting an arrest; and in note to 61 Am. Dec. 159.

Arrest Without Warrant may be made by an officer who has reasonable cause to believe that the party arrested has committed a felony, p. 578.

Affirmed in *Croom v. State*, 85 Ga. 723; 21 Am. St. Rep. 183. Cited in *State v. Morgan*, 22 Utah, 168, 170, 171, 172, sustaining right of sheriff's posse to make arrest; citing main case also on question of distinction between murder and manslaughter; *State v. Taylor*, 70 Vt. 12, 67 Am. St. Rep. 656 holding certain evidence admissible as to intent of persons assaulting one attempting to arrest them.

"**Willful, Deliberate, and premeditated**" being the phrase used in the statute defining murder, it is not error to substitute "or" for "and" in charging the jury on this point, p. 586.

Cited in *Lovett v. State*, 30 Fla. 154, holding an instruction as to premeditation correct; and in *State v. Lopez*, 15 Nev. 414, holding that premeditated and deliberate are synonymous.

Killing an Officer, trying to make and arrest, is murder, p. 587.

Affirmed in *State v. Spaulding*, 34 Minn. 306; *White v. State*, 70 Miss. 258; *State v. Gay*, 18 Mont. 79.

General Citation.—*Miller v. State*, 130 Ala. 16.

27 Cal. 588-596. DORE v. SELLERS.

Mechanic's Lien, of employees of the contractor, arises under and flows from the original contract, p. 594.

Affirmed in *Davis v. Livingston*, 29 Cal. 290, adding: "And it follows, that no agreement subsequently made between the principal parties, unless seasonably disclosed to the workmen and materialmen, can be set up to their disadvantage"; to same effect in *Shaver v. Murdock*, 36 Cal. 298; *Aste v. Wilson*, 14 Colo. App. 328, noted under *Bowen v. Aubrey*, 22 Cal. 566; *Whittier v. Blakely*, 13 Oreg. 559, holding that the lien attaches on delivery of the material and service of notice of lien.

Mechanic's Lien does not exist in favor of a contractor's materialman or laborer, against the owner of the property, if they did not give the statutory notice of their claim until after payment was made to the contractor according to the contract, p. 595.

Affirmed in *Blythe v. Poultney*, 31 Cal. 238; *Dingley v. Greene*, 54 Cal. 335; *Wiggins v. Bridge*, 70 Cal. 439. Cited in *Frost v. Falgetter*, 52 Neb. 694, on point that contractor may waive lien, and holding subcontractor affected thereby. Distinguished in *Kellogg v. Howes*, 81 Cal. 175, holding that under sections 1183 and 1184 of the Code of Civil Procedure, as amended, if the owner fails to record the contract, it is void, and subcontractors, laborers, and materialmen may enforce their lien, without notice to the owner and without regard to his payments to the contractor.

27 Cal. 596-603. VANDEWATER v. McRAE.

Indorser of note secured by mortgage may be sued personally, after foreclosure of the mortgage, for any deficiency, p. 603.

Affirmed in *Allin v. Williams*, 97 Cal. 407; *Savings Bank v. Central etc. Co.*, 122 Cal. 35, discussing right to sue junior mortgagor personally after loss of security under senior mortgage; *County Bank v. Greenberg*, 127 Cal. 130, holding suit on note given as collateral security for overdraft not barred by prior suit on mortgage to secure such overdraft; *Mallory v. Kessler*, 18 Utah, 15, 72 Am. St. Rep. 766, sustaining action for deficiency on note after application of proceeds of sale under power in trust deed; *Blumberg v. Birch*, 99 Cal. 417, 37 Am. St. Rep. 69, holding that where the mortgage was foreclosed upon publication of summons to the mortgagor, a deficiency judgment against him could not be included in the foreclosure proceedings, but must be by separate action. Affirmed in *Merced Bank v.*

Casaccia, 103 Cal. 643. Cited in *Carver v. Steele*, 116 Cal. 119, 58 Am. St. Rep. 158, holding that an indorser of a note secured by mortgage was not discharged by failure of the mortgagee to foreclose when the premises were sold on foreclosure of a prior mortgage; and in *First Nat. Bank v. Williams*, 2 Idaho, 626, holding that where a note is secured by mortgage, a suit cannot be brought on the note alone, unless the mortgage is valueless.

27 Cal. 603-607. **CUNNINGHAM v. HAWKINS.**

Parol Evidence is admissible to show that a deed absolute on its face was intended to be a mortgage. There is but one form of action in this state, and the same rules of evidence must be applied alike to all cases, p. 606.

Affirmed in *Hopper v. Jones*, 29 Cal. 19. Cited, as an illustration, *Peck v. Vandenberg*, 30 Cal. 28, to the point that parol evidence is admissible to show that a deed is a gift. Cited in *Byrne v. Hudson*, 127 Cal. 256, on point that no title passes under such deed; *Sears v. Dixon*, 33 Cal. 332, holding that the object of admitting parol evidence is "to show the real nature of the transaction, without regard to the mode or form in which the instruments in writing were executed." Affirmed in *Gay v. Hamilton*, 33 Cal. 690; also in *Jackson v. Lodge*, 36 Cal. 48, 49, a majority of the court holding that the rule applies at law as well as in equity, and the dissenting opinion disapproving of the principal case, on page 63. Affirmed in *Raynor v. Lyons*, 37 Cal. 454; *Taylor v. McLain*, 64 Cal. 514; *Turner v. McDonald*, 76 Cal. 180; 9 Am. St. Rep. 191; and in *Brandt v. Thompson*, 91 Cal. 461, holding that the rule of the principal case and *Jackson v. Lodge*, 36 Cal. 48, was "restored by sections 2924 and 2925 of the Civil Code," and the "doctrine of *Hughes v. Davis*, 40 Cal. 117, has been abrogated"; *Hughes v. Davis* having overruled *Jackson v. Lodge*, without referring to the principal case, *Rhodes J.*, who delivered the dissenting opinion in *Jackson v. Lodge*, saying in the opinion in *Hughes v. Davis*: "Since the decision of that case I have seen nothing which tended to shake my confidence in the conclusion which I then expressed, and I again announce that, in my opinion, an absolute deed does convey the legal title." Affirmed in *McAnnulty v. Seick*, 59 Iowa, 590, holding that parol evidence is admissible in law and equity to show that a bill of sale was intended as a mortgage. Cited in note on this point in 76 Am. Dec. 488.

27 Cal. 611-613; 87 Am. Dec. 102. **DELAND v. HIETT.**

Part Payment of a Judgment, under a dry agreement that it should operate as a satisfaction in full, does not discharge the judgment, p. 612.

Affirmed in *Siddall v. Clark*, 89 Cal. 323, holding that an agreement of an administratrix to accept, in payment of a judgment due the estate, a note for a less amount, was without consideration and void;

also in *Brockley v. Brockley*, 122 Pa. St. 6. Cited in notes on this point in 91 Am. Dec. 183, 244, and 1 Am. St. Rep. 398.

27 Cal. 613-630. **CREIGHTON v. MANSON.**

Street Assessment is not a tax; if it were, it could no more be levied solely on the property contiguous to the improved street, than the expense of any branch of the municipal government could be so levied. And to uphold it on the principle of eminent domain, just compensation must be made for property taken; it has been often held that the owner of the property should be deemed to be compensated by the benefits in the way of an increase of value that the property has received by the adjacent improvements, but that theory is only admitted for the purposes of this case, pp. 620-621.

Overruled in *Emery v. San Francisco Gas Co.*, 28 Cal. 348, 349, holding that a street assessment is a tax, and saying that after a more thorough investigation of the subject than was given in the principal case, the views of the court "have been somewhat modified," and the discussion of the subject now is "as if the questions were new in this state, without further reference to *Creighton v. Manson*." Cited in *Martin v. Tyler*, 4 N. Dak. 304, holding that a statute providing for the taking of land for drainage purposes, without providing for proper compensation, is unconstitutional; *Warren v. Hanly*, 31 Iowa, 42, holding that a statute providing for paving streets, at the expense of lots abutting thereon, is constitutional; *Hammett v. Philadelphia*, 65 Pa. St. 155, 3 Am. Rep. 621, 622, holding that a statute authorizing the paving of a street is unconstitutional, so far as it authorizes the expense to be paid by the owners of property abutting on the street; and in notes, on eminent domain in 25 Am. Dec. 622, and 40 Am. Dec. 267.

Owner of Property Assessed, prior to act of 1862, was not personally liable for a street assessment, but the action was in rem, to enforce the payment of the assessment by a decree for the sale of the lot, p. 623.

Distinguished in *Walsh v. Mathews*, 29 Cal. 124, saying: "It was not decided in that case that the property holder could not be made personally responsible, but only that the act under which the improvement was made did not impose a personal liability. In this case . . . the work was done and the assessment levied under the act of 1862, which in express terms makes the owner as well as the property liable."

Assessment must not exceed the value of the benefit conferred by the making of the improvement and certainly an assessment should not be laid either upon the property or the owner where, instead of a benefit to the property, the owner has received only an injury, p. 624.

Cited in dissenting opinion in *Lent v. Tillson*, 72 Cal. 441, to the point that the statute ordering the widening of Dupont street in San Fran-

cisco was unconstitutional, because the assessment was in excess of benefits; a majority of the court holding the statute constitutional. Affirmed in *Zoeller v. Kellogg*, 4 Mo. App. 165.

Statute as to street assessments must be strictly construed, p. 628.

Affirmed in *Hudford v. Omaha*, 4 Neb. 353, holding that where the grade of a street is changed without first finding and tendering the amount of damages to property owners, the proceedings are void.

Resolution of Intention of board of supervisors to grade a street need not necessarily be in the usual form of a municipal ordinance and be preceded by the words, "Be it ordained, etc." but whatever its form it amounts in substance to an ordinance, and must be passed in the mode prescribed for the passage of ordinances. It is a legislative act it must be presented to the president of the board for his approval, 629, 630.

Affirmed, as to presentation of resolution to president, in *Thompson v. Hoge*, 30 Cal. 170, 180. Distinguished in *Taylor v. Palmer*, 31 Cal. 243, holding that the act of 1862 prescribed that the resolutions as to street work should not be deemed ordinances, therefore they need not be presented to the mayor for approval, and resolutions of intention need only be passed by the board and signed by the clerk. Referred to in *Creighton v. San Francisco*, 42 Cal. 448, another phase of the principal case, decided on other points. Cited in *Napa v. Easterby*, 76 Cal. 228, as not being opposed to the view that a provision in the city charter of Napa as to the style of ordinances was "merely directory" as applied to a resolution for street work; and in *Quinchard v. Board of Trustees*, 113 Cal. 669, to the point that "whether an existing street shall be improved is a question to be addressed to the governing board of a municipality in its legislative capacity, and its determination upon that question, as well as upon the character of the improvement to be made, is a legislative act"; and in *Martindale v. Palmer*, 52 Ind. 414, holding the signature of a mayor not essential to the validity of an ordinance passed by a municipal corporation.

27 Cal. 630-638. **PEOPLE v. YSLAS.**

Evidence of Unchastity of a witness is inadmissible to impeach her testimony; the inquiry must be restricted to her reputation for truth and veracity, p. 633.

Cited in *Heath v. Scott*, 65 Cal. 551, holding that under sections 1847 and 2051 of the Code of Civil Procedure, "general character for truth, honesty, and integrity may be inquired into." Affirmed in *State v. Larkin*, 11 Nev. 331. Cited in notes on this point in 15 Am. Dec. 100, 17 Am. Dec. 77, and 53 Am. St. Rep. 479.

The common-law definition of an assault is substantially the same as that found in the statute, p. 633.

Cited in *People v. Lee Kong*, 95 Cal. 608, 29 Am. St. Rep. 167, holding that firing a pistol through the roof was an assault, though the party fired at was not there at the time; *State v. Sears*, 86 Mo. 174, holding that intent to do bodily harm is essential; *Thomas v. State*, 99 Ga. 43, holding that demonstrations of violence, coupled with apparent ability, so as to compel the party assaulted to retreat, constitute an assault; Cited in *Hollister v. State*, 156 Ind. 258, holding evidence not sufficient to sustain conviction for assault with intent to commit rape; notes to 39 Am. Rep. 713, and 41 Am. Rep. 493.

27 Cal. 643-648. **LEACH v. DAY.**

Injunction Against Trespass may be granted for the purpose of quieting a possession or preventing a multiplicity of actions, or where the value of the inheritance is put in jeopardy, or where irreparable mischief is threatened in relation to mines, quarries, or woodland, whether the same result from the nature of the injury itself or from the insolvency of the party committing it, p. 646.

Cited in *More v. Massini*, 32 Cal. 594, granting an injunction against entry on lands to quarry asphaltum; *Nevada Co. v. Kidd*, 37 Cal. 307, refusing an injunction against diversion of water, because it did not amount to waste; *Richards v. Kirkpatrick*, 53 Cal. 434, refusing an injunction against a sale on execution, because there was an adequate remedy at law; *Richards v. Dower*, 64 Cal. 64, granting an injunction against constructing a tunnel through lands; and in *Spring Valley v. Bartlett*, 8 Sawy. 569, 16 Fed. Rep. 626, refusing an injunction against passage by a board of supervisors of an ordinance fixing water rates, because there was an adequate remedy at law.

27 Cal. 649-654. **MARRINER v. SMITH.**

Cloud on Title.—Injunction against execution sale of land as a cloud on title, refused because plaintiff's bought the land with record notice of the judgment on which the execution issued, and it does not appear that any fraud was practiced on them, and they did not make the judgment creditor a defendant in their suit for an injunction, pp. 651, 652.

Cited in *Porter v. Pico*, 55 Cal. 176, enjoining an execution sale, because it would be a cloud on title; and in *Archbishop v. Shipman*, 69 Cal. 592, holding that a sale on foreclosure would not be a cloud on the title of the owner of the land who was not a party to the judgment; and in notes, on relief in equity against a judgment, in 19 Am. Dec. 607, and 54 Am. St. Rep. 252.

Homestead.—If an abandonment of homestead, and conveyance thereof to a stranger, was "one transaction and took effect at the same moment of time," and the value of the homestead did not exceed five

thousand dollars, prior judgment against the husband was not a lien on the homestead, pp. 652, 653.

Cited in *Eby v. Foster*, 61 Cal. 286, holding that the delivery of a deed, and filing it and a declaration of homestead for recording, were simultaneous, and the lien of a prior judgment did not attach; and in notes, on judgment liens against homesteads, in 87 Am. Dec. 278; 93 Am. Dec. 351; 20 Am. Rep. 151; 34 Am. St. Rep. 501; 38 Am. St. Rep. 247.

Fraud in obtaining judgment, by taking a default in a case that had been settled, held not to be an issue under the pleadings, p. 652.

Cited in *Hogg v. Link*, 90 Ind. 351, holding that where a judgment lien was obtained by fraud, it could not be collaterally attacked by a subsequent vendee of the land, although his vendor might have done it; and in dissenting opinion in *Humboldt Co. v. Terry*, 11 Nev. 248, a majority of the court holding that a confession of judgment was rightly entered.

27 Cal. 655-685. PEOPLE v. BOARD OF SUPERVISORS.

Mandamus.—The rules of the Civil Practice Act are as strictly applicable to the pleadings in mandamus as to those in any action, p. 670. The general rules of pleading are substantially the same in mandamus as in other civil actions, p. 671.

Affirmed in *People v. Lothrop*, 3 Colo. 448, and *Chamberlain v. Warburton*, 1 Utah, 270. Cited in *Jones v. Board*, 141 Cal. 98, holding application subject to general rules regarding limitations.

Facts must be Plead, showing wherein an ordinance is illegal, not the assumed inference, p. 675.

Affirmed in *Hedges v. Dam*, 72 Cal. 522, and *Lyman v. Martin*, 2 Utah, 149, 150.

Distinguished in *People v. Reclamation Dist.*, 121 Cal. 526, sustaining complaint in quo warranto.

Bribery at Election held to be immaterial issue, p. 676.

Cited, and not decided, in *Belo v. Commissioners*, 76 N. C. 497; *Board v. Coler*, 113 Fed. 735, quoting *Belo v. Commissioners*, 76 N. C. 489.

Res Judicata.—A fundamental fact in an action, that must have been found by the court before a judgment could have been rendered, cannot be again litigated in another action between the same parties, p. 676.

Affirmed in *Jackson v. Lodge*, 36 Cal. 38. Cited in *Sauls v. Freeman*, 24 Fla. 223, 224, 12 Am. St. Rep. 198, holding a former judgment to be an absolute bar to further litigation; Cited in *Slater v. Skirving*, 51 Neb. 114, 66 Am. St. Rep. 448, holding prior default judgment *res adjudicata*.

Municipal aid to a railroad having been authorized by the legislature and the city having voted in favor of it, delivery of municipal bonds by the city* to the corporation became a duty, and a subsequent compromise between the city and the railway did not affect its legality, p. 681.

Cited in *Leavenworth Co. v. Miller*, 7 Kan. 506, 12 Am. Rep. 440, holding that the legislature may authorize municipal aid for a railroad; *State v. Davis*, 11 S. Dak. 115, 118, 74 Am. St. Rep. 782, sustaining right of county to compromise judgment claim against it; *Talcott v. Pine Grove*, 1 Flipp. 136, Fed. Cas. No. 13,735, noted under *Pattison v. Board*, 13 Cal. 175; *Harcourt v. Good*, 39 Tex. 472, holding that a tax in aid of a railroad could be collected.

27 Cal. 685-688. **LEVY v. GETLESON.**

Statement on Appeal.—After a nonsuit in the lower court, the merits of that judgment can be investigated only on motion for new trial or on appeal from the judgment; and a statement, not conforming to the statutory requirements in this regard, is properly stricken out by the lower court, p. 688.

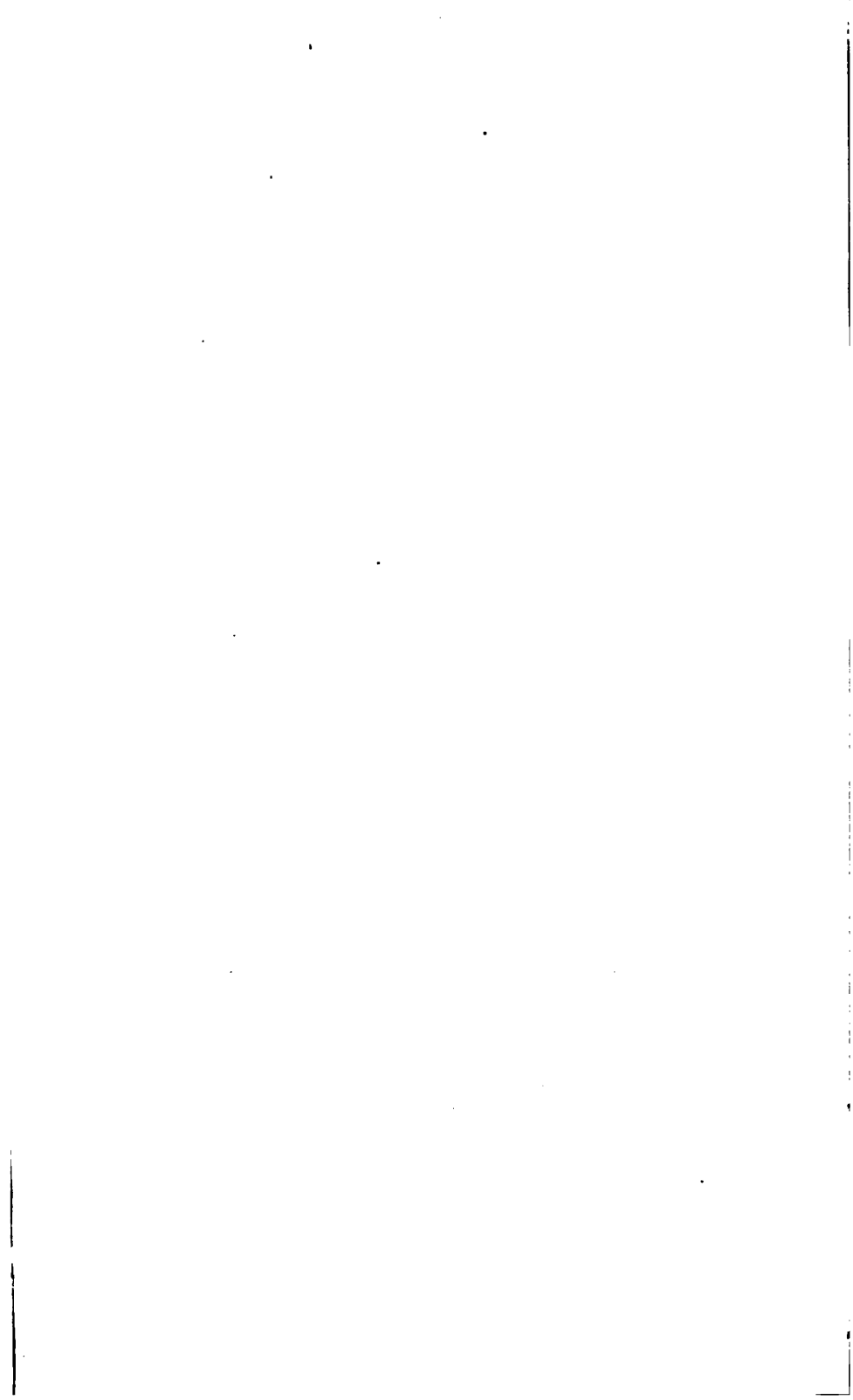
Distinguished in *Calderwood v. Pyser*, 31 Cal. 337, holding that where a referee's report contains an erroneous conclusion of law, the lower court may correct it before entering judgment; dissenting opinion in *Quivey v. Gambert*, 32 Cal. 326, as an example of the practice of striking out a statement; *Nicoll v. Littlefield*, 60 Cal. 240, holding that as an appeal from a nonsuit contained no statement, it must be dismissed. Affirmed in *Williams v. Rice*, 13 Nev. 237. Cited, *Sanford v. Duluth Co.*, 2 N. Dak. 10, holding that on an appeal from the judgment errors of law at the trial can be reviewed.

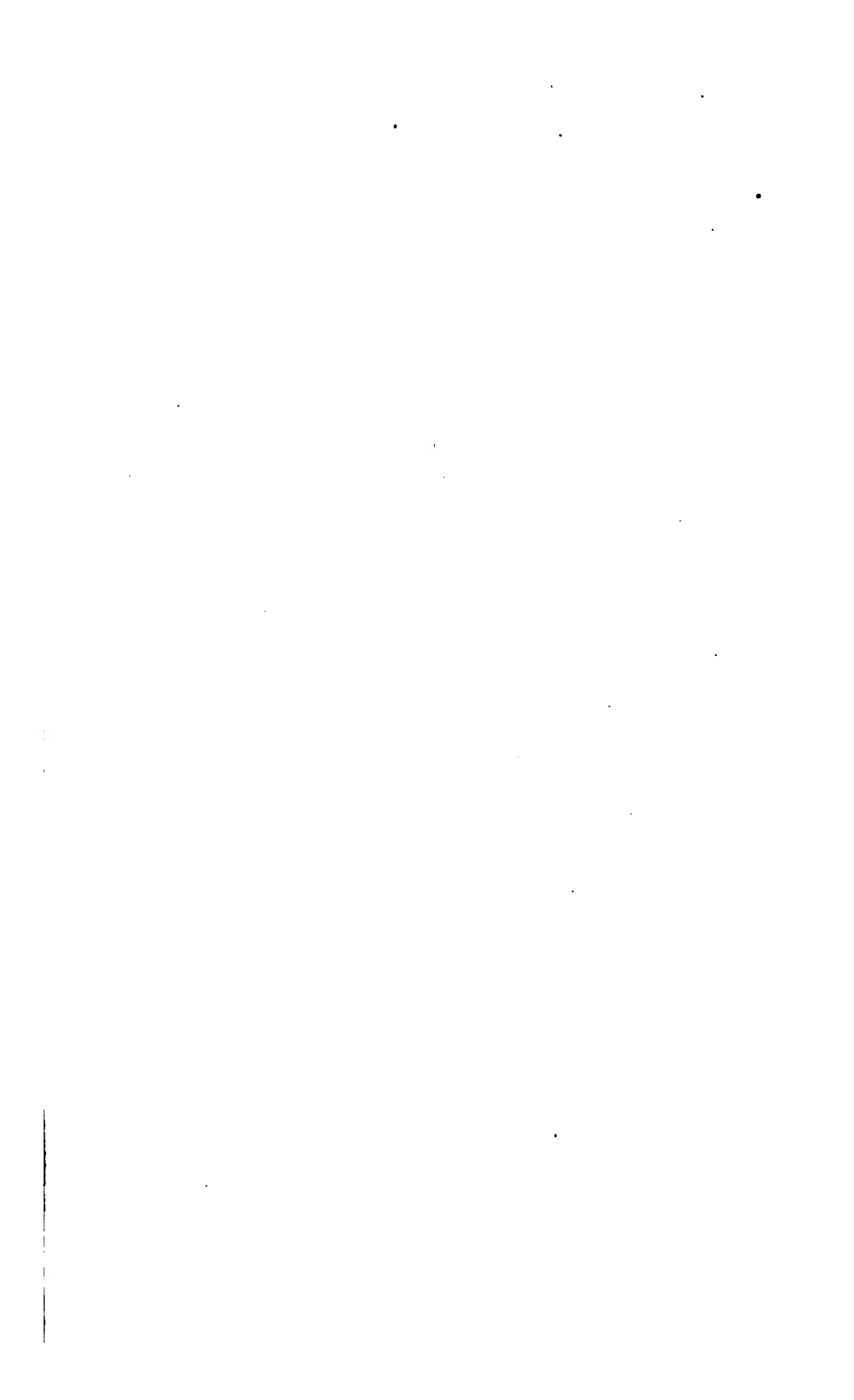
Taxation of Costs, made before final judgment, must be reviewed by a statement on appeal from the judgment; an order refusing to retax costs is not appealable, p. 688.

Affirmed in *Lansky v. Davis*, 33 Cal. 678, holding that though the taxation is made after entry of judgment, the law considers it as having been made before. Distinguished in *Dooly v. Norton*, 41 Cal. 441, 443, holding that an order refusing to retax costs, made at the next term after the entry of judgment, was appealable. Affirmed in *Rader v. Nottingham*, 2 Mont. 158.









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